Supreme Court, U.S.
FILED
02 583 OCT 10 2002
OFFICE OF THE CLERK

Supreme Court of the United States

MATTHEW R. LIMON,

Petitioner,

—v.—

KANSAS,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE COURT OF APPEALS OF THE STATE OF KANSAS

PETITION FOR WRIT OF *CERTIORARI*

Tamara Lange
(*Counsel of Record*)
Steven R. Shapiro
Matthew A. Coles
James D. Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street
New York, New York 10004
(212) 549-2500

85 pp

QUESTIONS PRESENTED

Do laws that impose a 17-year prison sentence for consensual oral sex between teenagers of the same sex violate the Equal Protection Clause where the sentence would be no more than 15 months if the teenagers were members of the opposite sex?

Does a sentence of over 17 years in prison, five years of supervised release and a lifetime classification as a sex offender for consensual oral sex between teenagers violate the Eighth Amendment when it is imposed because the teenagers were not members of the opposite sex?

Does increasing Petitioner's sentence beyond the statutory maximum based on a prior juvenile adjudication that was neither pled in the charging document nor proved to a jury violate the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment?

LIST OF PARTIES

The caption of the case includes the names of all parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

I. Kansas's "Romeo and Juliet" Law 3

II. Petitioner's Conviction and Appeals 6

REASONS FOR GRANTING THE WRIT 9

I. The Ruling Upholding Kansas's Discriminatory Sodomy Law Conflicts with the Court's Equal Protection Jurisprudence and Presents Important Questions on Which Lower Courts Have Divided 9

A. Intentionally Disadvantaging Gay Teenagers to Express Moral Disapproval of Homosexuality Conflicts with the Court's Equal Protection Jurisprudence 11

1. Kansas Discriminates Based on Sexual Orientation by Punishing Gay Teenagers More Severely than Heterosexual Teenagers Who Engage in Identical Acts 11

2. Imposing Harsher Punishments Based on Sexual Orientation Does Not Advance Legitimate State Interests in Promoting Morality or Protecting Children 13

B. Reliance on the Due Process Decision in *Bowers v. Hardwick* Conflicts with the Court's Equal Protection Jurisprudence and Adds to a Conflict in the Federal Circuit Courts and State Courts of Last Resort on an Important Issue of Federal Law 18

C. Targeting Same-Sex Consensual Activity for Special Condemnation Has Severe Social and Psychological Consequences for Gay Teenagers 20

II. The Ruling that Kansas May Punish Petitioner for His Sexual Orientation Conflicts with the Court's Eighth Amendment Jurisprudence 22

III. The Ruling Upholding a Sentence Beyond the Statutory Maximum Based on a Prior Juvenile Adjudication Never Alleged in the Complaint, Admitted or Proved to a Jury Adds to a Split of Authority in the Lower Courts on an Important Question of Constitutional Law 25

CONCLUSION 27

APPENDIX

Order Denying Petition for Review 1a

Order Denying Motion for Rehearing or Modification... 2a

Memorandum Opinion 3a

Transcript of Continuation of Sentencing and Defendant's Motion for Dispositional Departure 16a

Journal Entry, August 10, 2000 ..... 19a

Notice and Motion for Dispositional Departure 21a
Journal Entry, June 27, 2000 ..... 24a

Transcript of Trial to the Court 26a

Stipulation of Facts 30a

Journal Entry, May 18, 2000 ..... 31a

Transcript of Hearing Upon Defendant's Motion to Dismiss 33a

Complaint/Information 39a

K.S.A. § 21-3501 ..... 41a

K.S.A. § 21-3505 ..... 42a

K.S.A. § 21-3522 ..... 43a

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 26

Andrade v. Attorney General of State of California,
270 F.3d 743 (9th Cir. 2001),
cert. granted sub nom. Lockyer v. Andrade,
70 U.S.L.W. 3497 (April 01, 2002) (No. 01-1127) 23, 28

Apprendi v. New Jersey,
530 U.S. 466 (2000) 25, 26

Atkins v. Virginia,
__ U.S. __, 122 S. Ct. 2242 (2002) 23

Barnes v. Glenn Theatre, Inc.,
501 U.S. 560 (1991) 15

Berman v. Parker,
348 U.S. 26 (1954) 14

Bowers v. Hardwick,
478 U.S. 186 (1986) ..... passim

Bradwell v. Illinois,
83 U.S. 130 (1872) 13

Brown v. Bd. of Ed. of Topeka,
347 U.S. 483 (1954) 21

Buck v. Bell,
274 U.S. 200 (1926) 13

Campbell v. Sundquist,
926 S.W. 2d 250 (Tenn. Ct. App. 1996) 5

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985) 13, 14, 17, 22

City of Topeka v. Movsovitz,
No. 77,372 (Kan. Ct. App. Apr. 24, 1998),
rev. denied, 960 P.2d 267 (Kan. 1998) (table) 18

Costarelli v. Massachusetts,
421 U.S. 193 (1975) 7

Commonwealth v. Wasson,
842 S.W.2d 487 (Ky. 1992) 5, 16

Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati,
128 F.3d 289 (6th Cir. 1997) 14

Griswold v. Connecticut,
381 U.S. 479 (1965) 18

Gryczan v. State,
942 P.2d 112 (Mont. 1997) 5, 19

Harmelin v. Michigan,
501 U.S. 957 (1991) 23

Harris v. United States,
__ U.S.__, 122 S. Ct. 2406 (2002) 26

Hooper v. Bernalillo County Assessor,
472 U.S. 612 (1985) 16

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 11

Jantz v. Muci,
976 F.2d 623 (10th Cir. 1992).....15

Jones v. United States,
526 U.S. 227 (1999).....27

Largent v. Texas,
318 U.S. 418 (1943).....7

Lawrence v. Texas,
41 S.W.3d 349.....9, 15, 18, 19, 27

Lee v. Weisman,
505 U.S. 577 (1992).....21

Lofton v. Kearney,
57 F. Supp. 2d 1372(S.D. Fla. 2001).....15

Loving v. Virginia,
388 U.S. 1 (1967).....11, 13

McLaughlin v. Florida,
379 U.S. 184 (1964).....11, 17

Moreno v. U.S. Dep't of Agric.,
345 F. Supp. 310 (D.D.C. 1972).....13

Nabozny v. Podlesny,
92 F.3d 446 (7th Cir. 1996).....21

Nash v. Florida Indus. Comm'n,
389 U.S. 235 (1967).....7

O'Conner v. Donaldson,
422 U.S. 563 (1975).....14

Oyama v. California,
332 U.S. 633 (1948) 17

Palmore v. Sidoti,
466 U.S. 429 (1982) 14, 17, 22

Penn. Ass'n of Retarded Children v. Penn.,
343 F. Supp. 279 (E.D. Penn. 1972) 13

Picado v. Jegley,
80 S.W.3d 332 (Ark. 2002) 5, 15

Plyler v. Doe,
457 U.S. 202 (1982) 21

Post v. State,
715 P.2d 1105 (Okla. Crim. App. 1986) 5, 6

Rice v. Sioux City Mem'l Park Cemetery,
349 U.S. 70, 79 (1955) 21

Ring v. Arizona,
__ U.S.__, 122 S. Ct. 2428, 2432 (2002) 26

Robinson v. California,
370 U.S. 660 (1962) 23

Romer v. Evans,
517 U.S. 620 ..... passim

S.N.E. v. R.L.B.,
699 P.2d 875 (Alaska 1985) 17

Sail'er Inn, Inc. v. Kirby,
485 P.2d 529 (Cal. 1971) 17

Sanchez v. Secretario de Justicia,
__ D.P.R. __, No. AC-2000-63,
2002 WL 1581480 (P.R. June 28, 2002).....6

Schochet v. State,
580 A.2d 176 (Md. 1990).....5

Shahar v. Bowers,
114 F.3d 1097 (11th Cir. 1997).....15, 19

Solem v. Helm,
463 U.S. 277 (1983).....23, 24

State v. Clemons,
45 P.3d 384 (Kan. 2002).....7

State v. Cogshell,
997 S.W.2d 534 (Mo. Ct. App. 1999).....5

State v. Hitt,
42 P.3d 737 (Kan. 2001),
petition for cert. filed (June 13, 2002) (No. 01-10864)..27, 28

State v. Long,
993 P.2d 1237 (Kan. App. 1999).....7

State v. Walsh,
713 S.W.2d 508 (Mo. 1986).....15

State v. Williams,
829 P.2d 892 (Kan. 1992).....3

Stemler v. City of Florence,
126 F.3d 856 (6th Cir. 1997).....19

United States Dep't of Agric. v. Moreno,
413 U.S. 528 (1973).....13, 14, 16, 17

United States v. Smalley,
294 F.3d 1030 (8th Cir. 2002).....27

United States v. Tighe,
266 F.3d 1187 (9th Cir. 2001).....26, 27

United States v. Virginia,
518 U.S. 515 (1996).....11, 13

Weems v. United States,
217 U.S. 349 (1910).....23

Williams v. Glendening,
No. 98036031/CL-1059
(Md. Balt. City Cir. Ct. Oct. 15, 1998).....5

Yick Wo v. Hopkins,
118 U.S. 356 (1886).....9

Statutes & Regulations

28 U.S.C. § 1257(a).....1, 7

1969 Kan. Sess. Laws §21-3505.....5

1973 Mont. Laws § 94-2-101.....5

1973 Tex. Gen. Laws § 21.06.....5

1974 Ky. Acts § 90.....5

1977 Ark. Acts No. 828, § 1.....5

1977 Mo. Laws § 566.090.....5

1977 Nev. Stat. § 17.....5

1989 Tenn. Pub. Acts § 39-13-510 5

Ala. Code § 13A-6-60(2) 5

Ala. Code § 13A-6-65(a)(3) 5

Fla. Stat. Ann. § 800.02 5

Idaho Code § 18-6605 5

Kan. Stat. Ann. § 21-3403 24

Kan. Stat. Ann. § 21-3410 24

Kan. Stat. Ann. § 21-3414 24

Kan. Stat. Ann. § 21-3420 24

Kan. Stat. Ann. § 21-3427 24

Kan. Stat. Ann. § 21-3501 .....2, 3, 12

Kan. Stat. Ann. § 21-3505 .....2, 3, 5, 7

Kan. Stat. Ann. § 21-3506 8

Kan. Stat. Ann. § 21-3518 24

Kan. Stat. Ann. § 21-3522 .....2, 3

Kan. Stat. Ann. § 21-4721 7

Kan. Stat. Ann. § 22-4902(c)(4) 4

La. Rev. Stat. Ann. § 14:89 5

Miss. Code Ann. § 97-29-59 5

Mo. Rev. Stat., § 566.090 6

Mo. Rev. Stat. § 566.064 6

N.C. Gen. Stat. § 14-177 5

Okla. Stat. tit. 21 § 886 5

Puerto Rico Pen. Code Art. 103 6

S.C. Code Ann. § 16-15-120 5

Tex. Penal Code Ann. § 21.11 6

Utah Code Ann. § 76-5-403(1) 5

Va. Code Ann. § 18.2-361(A) 5

Other Authorities

Anne B. Goldstein, History, Homosexuality and Political Values, 97 Yale L.J. 1073, 1082-83 (1998) 4

Full Assault on Sodomy Laws, The Advocate, Aug. 20, 2002 5

Human Rights Watch, *Hatred in the Hallways: Violence and Discrimination against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools* (2001), http://www.hrw.org/reports/2001/uslgbt/toc.htm 23

George Painter, *The Sensibilities of Our Forefathers,* www.sodomylaws.org/sensibilities/arkansas.htm.....5

OPINIONS AND ORDERS BELOW

The oral decision of the Kansas District Court denying Petitioner's Motion to Dismiss was issued on May 18, 2000 and is reprinted in the appendix at 33a. The unpublished decision of the Kansas District Court denying Petitioner's Motion for Durational and Dispositional Departure was issued on August 10, 2000 and is reprinted in the appendix at 19a. The unpublished opinion of the Kansas Court of Appeals was entered on February 1, 2002 and is reprinted in the appendix at 3a. On February 26, 2002, the Court of Appeals denied Petitioner's timely Motion for Rehearing or Modification of Eighth Amendment Holding; that unpublished order is reprinted in the appendix at 2a. The Kansas Supreme Court's June 13, 2002 unpublished decision denying Petitioner's timely petition for discretionary review is reprinted in the appendix at 1a.

JURISDICTION

The Kansas Supreme Court's decision denying review was entered on June 13, 2002. On August 15, 2002, the Court granted Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari to the Court of Appeals of the State of Kansas to October 11, 2002. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted."

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation[.]"

Kansas Statutes § 21-3501 defines sodomy as "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object[.]" The full text of the statute is set forth in the appendix at 41a.

Kansas Statutes § 21-3505(a)(2) prohibits "sodomy with a child who is 14 or more years of age but less than 16 years of age[.]" The full text of the statute is set forth in the appendix at 42a.

Kansas Statutes § 21-3522 prohibits "engaging in voluntary . . . sodomy . . . with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex[.]" The full text of the statute is set forth in the appendix at 43a.

STATEMENT OF THE CASE

I. Kansas's Romeo and Juliet Law

Under Kansas law, oral sex is a form of sodomy. Kan. Stat. Ann. § 21-3501. Identical acts of consensual sodomy between teenagers are criminalized under two different statutes with dramatically different penalties. The sexual orientation of the defendant determines which statute – and therefore which penalty – applies.

Kansas's general criminal sodomy statute prohibits "sodomy with a child who is 14 or more years of age but less than 16 years of age," without regard to consent, the age of the offender, or the sex of the participants. Kan. Stat. Ann. § 21-3505 (the "criminal sodomy law"). In contrast, Kansas's so-called Romeo and Juliet law provides for comparatively mild criminal penalties when two teenagers engage in voluntary sexual intercourse, sodomy or lewd touching; the younger teenager is between 14 and 16 years old; the older teenager is less than 19 years old; the age difference is less than 4 years; there are no third parties involved; and the two teenagers "are members of the opposite sex." Kan. Stat. Ann. § 21-3522 (the "Romeo and Juliet law").[1]

The punishments for the two crimes are radically different. Under the Romeo and Juliet law, first and second offenses result in presumptive probation; a third offense carries a maximum sentence of 15 months. Under the criminal sodomy law, a first offense carries a presumptive sentence of 55 to 61 months. The sentencing range for a second offense is 89 to 100 months and for a third offense is

[1] The more specific Romeo and Juliet law controls whenever a specified activity is covered by both the Romeo and Juliet law and the criminal sodomy law. *Cf. State v. Williams*, 829 P.2d 892, 897 (Kan. 1992).

206 to 228 months.[2] In addition, unlike a violation of the Romeo and Juliet law, criminal sodomy is categorized as a "sexually violent crime" that automatically triggers mandatory sex offender registration. *See* Kan. Stat. Ann. § 22-4902(c)(4).

As the Kansas Court of Appeals explained, the purpose of the Romeo and Juliet law "is to recognize the judgment that consensual sexual activity between a young adult and a not-quite adult, although wrong, is not as criminal as sexual activity between persons farther apart in age." App. 7a. Despite this general purpose, Kansas limited the Romeo and Juliet law to members of the opposite sex, thereby making it inapplicable to gay teenagers.[3] Heterosexual teenagers who engage in consensual oral sex are punished under the Romeo and Juliet law, while gay teenagers who engage in consensual oral sex are treated as child molesters and are punished under Kansas's criminal sodomy law.

Kansas's decision to target gay teenagers for more severe punishment is part of a larger pattern of discriminatory sodomy laws. American sodomy laws historically applied to both same- and opposite-sex couples. *See Bowers v. Hardwick,* 478 U.S. 186, 215-17 (1986) (Stevens, J., dissenting); Anne B. Goldstein, *History, Homosexuality and Political Values,* 97 Yale L.J. 1073, 1082-83 (1998). Over the last 40 years, however, while many States were abandoning sodomy laws altogether, ten States made their

---

[2] Because both the Romeo and Juliet law and the criminal sodomy law apply to juvenile offenders, similar disparities in sentencing arise even when the two teenagers are both 14 or 15 years old.

[3] The generic term "gay teenagers" includes lesbian, gay and bisexual teenagers, all of whom are sexually oriented toward members of the same sex.

sodomy laws applicable only to same-sex couples.[4] As the sponsor of the 1977 Arkansas bill explained, these same-sex-only sodomy laws were "aimed at weirdos and queers."[5]

Today, most same-sex-only sodomy laws have been repealed or struck down on state constitutional grounds,[6] and only nine States still retain generally-applicable sodomy laws.[7] Nevertheless, despite numerous legal challenges over the years, Kansas, Texas, Missouri and Oklahoma still subject same-sex couples to criminal penalties when they participate in sexual activities that are entirely legal for heterosexuals.[8] Like the same-sex-only sodomy laws of the

---

[4] 1969 Kan. Sess. Laws § 21-3505; 1973 Tex. Gen. Laws § 21.06; 1973 Mont. Laws § 94-2-101; 1974 Ky. Acts § 90; 1977 Ark. Acts No. 828, § 1; 1977 Mo. Laws § 566.090; 1977 Nev. Stat. § 17; 1989 Tenn. Pub. Acts § 39-13-510; *Post v. State,* 715 P.2d 1105 (Okla. Crim. App. 1986) (invalidating Okla. Stat. tit. 21, § 886 as applied to heterosexuals); *Schochet v. State,* 580 A.2d 176 (Md. 1990) (holding Md. Code Ann. art. 27, § 554 inapplicable to heterosexual activity).

[5] *See* George Painter, *The Sensibilities of Our Forefathers at* www.sodomylaws.org/sensibilities/arkansas.htm (visited Oct. 8, 2002) (citation omitted).

[6] *Commonwealth v. Wasson*, 842. S.W.2d 487 (Ky. 1992); 1993 Nev. Stat. 515; *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Williams v. Glendening*, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998); *Picado v. Jegley*, 80 S.W.3d 332 (Ark. 2002).

[7] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(A).

[8] Kan. Stat. Ann. § 21-3505(a)(1); Tex. Pen. Code § 21.06; Mo. Rev. Stat. § 566.090; Okla. Stat. tit. 21 § 886. One Missouri Court of Appeals has construed Missouri's same-sex-only sodomy law to apply only to non-consensual acts, *see State v. Cogshell,* 997 S.W.2d 534 (Mo. Ct. App. 1999), but Missouri continues to prosecute consensual sodomy between same-sex adults in the other half of the State. *See Full Assault on Sodomy Laws, The Advocate,* Aug. 20, 2002. Similarly, although

1970s and 80s, the exclusion in Kansas's Romeo and Juliet law was designed to discriminate based on sexual orientation. As the Kansas Court of Appeals recognized, "the argument that it is not aimed at homosexuals cannot be made with a straight face." App. 7a.[9]

II. Petitioner's Conviction and Appeals

One week after Petitioner Matthew Limon's eighteenth birthday he performed consensual oral sex on M.A.R., a younger male teenager who attended the same residential school for developmentally disabled youth. App. 4a. M.A.R. was nearly 15 years old – three years, one month and a few days younger than Petitioner. App. 5a. All of the requirements for application of Kansas's Romeo and Juliet law were satisfied in Petitioner's case save one: the two teenagers were not members of the opposite sex. Because the Romeo and Juliet law did not apply, Petitioner was charged with violating Kansas's criminal sodomy law.

Before trial, Petitioner filed a Motion to Dismiss and Prevent Manifest Injustice. He argued that making the far

---

Oklahoma's sodomy statute is generally applicable on its face, it has been judicially construed to exclude consensual heterosexual behavior. *See Post v. State,* 715 P.2d 1105 (Okla. Crim. App. 1986). In addition, Puerto Rico maintains a same-sex-only sodomy law. Puerto Rico Pen. Code Art. 103; *Sanchez v. Secretario de Justicia,* __ D.P.R. __, No. AC-2000-63, 2002 WL 1581480 (P.R. June 28, 2002).

[9] Nor is Kansas an anomaly. Texas also has a discriminatory sodomy law that specifically targets gay teenagers. See Tex. Penal Code Ann. § 21.11 (establishing an affirmative defense to prosecution for sexual contact with a child if the "actor . . . was not more than three years older than the victim and *of the opposite sex*") (emphasis added). Moreover, in Missouri, gay teenagers who engage in consensual sodomy can be punished as juvenile offenders under the adult same-sex-only sodomy law, while heterosexual teenagers who engage in the identical sexual activity commit no crime. *See* Mo. Rev. Stat. §§ 566.090; 566.064.

more lenient penalties of the Romeo and Juliet law inapplicable solely because Petitioner and the other teenager involved were members of the same sex violated the Fourteenth Amendment guarantee of equal protection. The Kansas District Court denied Petitioner's motion, concluding that it would be inappropriate to inquire whether "the state legislature's intention to protect children from homosexual activity at a level greater than heterosexual activity . . . was or was not legitimate." App. 36a. Petitioner and the State then stipulated that the other male student had consented to oral sex performed by Petitioner, app. 30a, Petitioner waived his right to a jury trial with respect to the stipulated facts, and the District Court found Petitioner guilty of one count of criminal sodomy in violation of § 21-3505(a)(2). App. 29a.

Petitioner then filed a Motion for Durational and Dispositional Departure in which he argued that imposition of the presumptive sentence would violate his Eighth Amendment right to be free from cruel and unusual punishments. App. 21a. The District Court denied the motion, app. 19a, and sentenced Petitioner to 206 months in prison, 60 months of post-release supervision and mandatory registration as a sex offender – a total of over 17 years in prison and five years of supervised release. App. 18a.[10]

Petitioner appealed to the Kansas Court of Appeals and raised three federal constitutional issues. First, Petitioner argued that his conviction and sentence under the criminal sodomy law violate the federal Equal Protection Clause

---

[10] The Kansas District Court is the highest state court authorized to consider the Eighth Amendment question, *see* Kan. Stat. Ann. § 21-4721; *State v. Long*, 993 P.2d 1237 (Kan. App. 1999); *State v. Clemons*, 45 P.3d 384, 395 (Kan. 2002), so it is properly before the Court. *See* 28 U.S.C. § 1257(a); *Largent v. Texas*, 318 U.S. 418, 422 (1943); *see also Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967); *Costarelli v. Mass.*, 421 U.S. 193, 198-99 (1975).

under any level of scrutiny.[11] In response, the State asserted that the Romeo and Juliet law rationally furthers state interests in promoting morality and protecting children. The Kansas Court of Appeals found no equal protection violation, holding that, under *Bowers v. Hardwick*, 478 U.S. 186 (1986), "[t]he United States Supreme Court does not recognize homosexual behavior to be in a protected class .... Therefore, there is no denial of equal protection when [homosexual] behavior is criminalized or treated differently[.]" App. 12a.

Second, Petitioner continued to argue that his sentence is based on his status as a gay teenager and is grossly disproportionate to the crime in violation of the Eighth Amendment prohibition on cruel and unusual punishments. The Court of Appeals did not address the argument. App. 14a.

Third, Petitioner argued that increasing his maximum sentence based on a prior juvenile adjudication that was never alleged in the Complaint, stipulated to, or proved to a jury beyond a reasonable doubt violated his Sixth Amendment and due process rights.[12] Absent consideration of the juvenile adjudication, Petitioner would have received a presumptive sentence under Kansas's criminal sodomy law of between 55 and 61 months; under the Romeo and Juliet law, he would have received presumptive probation. The Court of Appeals rejected Petitioner's challenge, holding that "juvenile adjudications can be used ... to enhance adult

---

[11] Petitioner argued that limiting the Romeo and Juliet law to members of the opposite sex impermissibly classifies teenagers based on their sex and sexual orientation.

[12] The Kansas District Court found at sentencing that Petitioner had been adjudicated delinquent when he was 14 years old, apparently based on two counts of sodomy with a child less than 14 years of age, in violation of Kan. Stat. Ann. § 21-3506.

sentences without implicating constitutional bars." App. 14a.

The Kansas Supreme Court denied Petitioner's timely Petition for Review in which he raised all of the foregoing federal constitutional issues.

REASONS FOR GRANTING THE WRIT

I. The Ruling Upholding Kansas's Discriminatory Sodomy Law Conflicts with the Court's Equal Protection Jurisprudence and Presents Important Questions on Which Lower Courts Have Divided

Disregarding the constitutional pledge that every person is entitled to "the protection of equal laws," *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886), the Kansas courts upheld a system of separate laws that makes the punishment for identical acts of sodomy between consenting teenagers turn on sexual orientation. Making the penalty for a crime depend on sexual orientation is antithetical to the basic promise of the Equal Protection Clause: a "commitment to the law's neutrality where the rights of persons are at stake." *Romer v. Evans,* 517 U.S. 620, 623 (1996). This promise of neutrality is broken not only in Kansas, but in every State with a same-sex-only sodomy law. Indeed, a similar equal protection question is presented in another petition now pending before the Court.[13]

---

[13] *See Lawrence v. Texas,* 41 S.W.3d 349 (Tex. App.-Houston [14th Dist.] Mar. 15, 2001) (holding law that prohibits "deviate sexual intercourse with another individual of the same sex" advances a legitimate state interest in "preserving public morals"), *rev. denied,* Nos. 0873-01 and 0874-01 (Tex. Ct. Crim. App. Apr. 17, 2002), *petition for cert. filed,* 71 U.S.L.W. 3116 (July 16, 2002) (No. 02-102).

By limiting the Romeo and Juliet law to members of the opposite sex, Kansas subjects gay teenagers to additional criminal penalties that are based not on any difference in their actions but on the State's moral disapproval of their sexual orientation toward members of the same sex.[14] The Court should grant *certiorari* to reiterate that a classification premised on moral disapproval of a group of people because of who they are rather than what they do is an impermissible "classification of persons undertaken for its own sake." *Romer*, 517 U.S. at 635.

In addition, when presented with equal protection questions involving sexual orientation, lower courts have divided over the proper interpretation of the Court's decisions in *Romer v. Evans* and *Bowers v. Hardwick*. This case presents an important opportunity to clarify that *Bowers* – a due process decision – does not apply in the equal protection context and that the equal protection principles articulated in *Romer* are not limited to cases involving state constitutional amendments that restrict participation in the political process.

Finally, resolution of the equal protection question is important not only to the individuals in this case, but to the general public. Laws that single out gay teenagers for special criminal sanctions legitimize other forms of discrimination against gay teenagers and contribute to pervasive social prejudice that has severe psychological consequences for all gay teenagers, whether or not they engage in the prohibited conduct.

---

[14] Petitioner does not dispute that Kansas may criminally regulate sexual activity involving children. Rather, he asserts that the Equal Protection Clause requires even-handed penalties when the State regulates identical consensual sexual activity between teenagers.

A. Intentionally Disadvantaging Gay Teenagers to Express Moral Disapproval of Homosexuality Conflicts with the Court's Equal Protection Jurisprudence

1. Kansas Discriminates Based on Sexual Orientation by Punishing Gay Teenagers More Severely than Heterosexual Teenagers Who Engage in Identical Acts

Limiting application of the Romeo and Juliet law to members of the opposite sex discriminates against gay teenagers by punishing them more severely than their heterosexual peers when they "commit intrinsically the same quality of offense." *McLaughlin v. Florida,* 379 U.S. 184, 194 (1964). Kansas subjects gay teenagers to harsher penalties not because they engage in different conduct but because they engage in that conduct with members of the same sex.[15]

Under Kansas law, the physical acts that constitute sodomy are identical for same- and opposite-sex couples. For example, the act of performing oral sex on a male teenager is precisely the same whether the two teenagers are members of the opposite sex or members of the same sex. The genitals of the person *performing* oral sex are simply

---

[15] As Petitioner argued in the Kansas courts, Kansas's statutory scheme also violates equal protection by making the penalty for his actions depend on his sex. *See J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) ("The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups[.]"); *Loving v. Virginia*, 388 U.S. 1, 7-8, 11 (1967) (holding law banning interracial marriage discriminated based on race even though it applied equally to blacks and whites); *United States v. Virginia*, 518 U.S. 515, 553, 559 (1996) (gender-based classification must be "substantially related" to "exceedingly persuasive justification").

irrelevant under Kansas's definition of sodomy.[16]

Because the acts involved are the same, any distinction between "homosexual activity" and "heterosexual activity," app. 10a, 35a, necessarily refers not to different activities but to the sexual orientation of the people involved in the activity. Indeed, what distinguishes gay people from heterosexual people is that gay people form intimate relationships with – and typically have sex and fall in love with – members of the same sex. The fact that heterosexual people are physically capable of having sex with a member of the same sex – and that some heterosexual people may do so at some point – does not obliterate that fundamental difference. Nor does it transform a classification that targets gay teenagers for legal disadvantage into a classification based on conduct. As the Kansas Court of Appeals acknowledged, "[l]iterally, the [Romeo and Juliet] statute criminalizes particular acts as opposed to sexual orientation. But practically, the argument that it is not aimed at homosexuals cannot be made with a straight face." App. 7a.

---

[16] In fact, although two boys cannot engage in sexual intercourse, every other act proscribed by the Romeo and Juliet law can be performed by two boys, by two girls or by an opposite-sex couple. Sodomy includes "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; [or] anal penetration . . . of a male or female by any body part or object[.]" Kan. Rev. Stat. § 21-3501(2). Like an opposite-sex couple, two girls can engage in sexual intercourse, defined as "any penetration of the female sex organ by a finger, the male sex organ or any object." Kan. Rev. Stat. § 21-3501(1). And, of course, both opposite-sex and same-sex couples can touch one another.

2. Imposing Harsher Punishments Based on Sexual Orientation Does Not Advance Legitimate State Interests in Promoting Morality or Protecting Children

Over the last century, both state and federal governments have used morality to defend what we now recognize as patent violations of equal protection. They have argued that the Equal Protection Clause allows the government to discriminate in order to express moral or religious disapproval of unrelated individuals living together, *see Moreno v. U.S. Dep't of Agric.* 345 F. Supp. 310, 314 (D.D.C. 1972), of women working outside the home, *see Bradwell v. Illinois,* 83 U.S. 130, 141 (1872) (Bradley, J., concurring), of interracial relationships, *see Loving v. Virginia,* 388 U.S. 1, 3 (1967), and of the mentally disabled, *see Penn. Ass'n of Retarded Children v. Penn.,* 343 F. Supp. 279, 294 (E.D. Penn. 1972); *Buck v. Bell*, 274 U.S. 200, 207 (1926). Ultimately, the Court has made it clear in each context that States may not promote morality by punishing people for who they are. *See Loving,* 388 U.S. at 11-12, *United States v. Virginia,* 518 U.S. 515, 550 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

Like laws that express moral disapproval based on living arrangements, sex, race or disability, laws that express moral disapproval based on sexual orientation violate equal protection because they are drawn "for the purpose of disadvantaging the group burdened by the law." *Romer,* 517 U.S. at 633. Such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate*

governmental interest.'" *Id.* at 634 (quoting *Moreno,* 413 U.S. at 534) (emphasis in original).

The same principle applies whether a classification is based on "animosity," *Romer,* 517 U.S. at 634, "negative attitudes," *Cleburne*, 473 U.S. at 448, "public intolerance," *O'Conner v. Donaldson*, 422 U.S. 563, 575 (1975), "bias," *Palmore v. Sidoti*, 466 U.S. 429, 433 (1982), or the fact that a group is politically unpopular, *see Moreno,* 413 U.S. at 534. What matters is not the descriptive language but the central idea that equal protection does not permit a classification created for the very purpose of discriminating against the disadvantaged group. *Romer,* 517 U.S. at 633; *see also Moreno,* 413 U.S. at 534-35 (invalidating statute motivated by disapproval of hippies); *Cleburne*, 473 U.S. at 448 (invalidating zoning ordinance based on "negative attitudes" toward mentally disabled).

The State is free to legislate to encourage people to *act* in ways the State believes are morally good and to discourage people from *acting* in ways the State believes are morally bad. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32-33 (1954). But it may not penalize one group of citizens more severely for the same acts merely because it disapproves of who they are; and it may not avoid the Equal Protection Clause by saying that its disapproval is based in morality. *See Moreno*, 413 U.S. at 534-35; *Romer,* 517 U.S. at 634; *Cleburne,* 473 U.S. at 448.

Despite the Court's consistent rulings to the contrary in other contexts, several lower courts have concluded that moral disapproval of homosexuality is a legitimate basis for discriminating against gay people.[17] *See Equality Found. of*

---

[17] These decisions have been engendered, at least in part, by the Court's statement in *Bowers v. Hardwick* that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and

Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 300-01 (6th Cir. 1997) (suggesting moral disapproval justified city charter amendment that prohibited protective laws or policies based on "homosexual, lesbian, or bisexual orientation, status, conduct or relationship"); *Shahar v. Bowers,* 114 F.3d 1097, 1108 (11th Cir. 1997) (holding concern about public hostility to same-sex religious marriage of future public employee justified revocation of employment offer); *Jantz v. Muci,* 976 F.2d 623, 630 (10th Cir. 1992) (approving qualified immunity for refusal to hire teacher perceived to be gay because unlawfulness was not apparent in light of reliance in *Bowers v. Hardwick* on "[m]oral opposition to homosexuality") (quoting *Barnes v. Glenn Theatre, Inc.,* 501 U.S. 560, 580 (1991) (Scalia, J., concurring)); *State v. Walsh,* 713 S.W.2d 508, 511-12 (Mo. 1986) (holding law prohibiting sexual activity between members of the same sex was rationally related to state interest in promoting public morality); *Lawrence,* 41 S.W.3d at 357 (rejecting equal protection challenge to Texas's same-sex-only sodomy law because discrimination was rationally related to legitimate interest in preserving public morality), *petition for cert. filed,* 71 U.S.L.W. 3116 (July 16, 2002) (No. 02-102). *But see Lofton v. Kearney,* 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001) (holding moral disapproval of homosexuality was not a legitimate governmental interest justifying a ban on adoption by gay parents).[18]

---

unacceptable" provided a rational basis under the Due Process Clause for criminalizing sodomy across the board, 478 U.S. at 196, and by the argument of the dissent in *Romer* that moral disapproval of "homosexual conduct" provided a rational basis for singling out gay people for disfavored legal status. 517 U.S. at 644, 648 (Scalia, J, dissenting). *But see id.* at 636 (Scalia, J, dissenting) (stating *Romer* "contradicts" broad reading of *Bowers*).

[18] Relying on state equal protection principles, the Supreme Courts of Arkansas and Kentucky have rejected reliance on morality to justify discriminatory sodomy laws. *Jegley,* 80 S.W.3d at 352 (holding State could not rely on "public morality" to condemn "conduct between same-

Like other states that have targeted gay people for legal disadvantage, Kansas contends that the Romeo and Juliet law rationally advances legitimate state interests in promoting morality and protecting children.[19] But the fact that the Romeo and Juliet law *as a whole* may relate to some legitimate purpose is immaterial. To satisfy the Equal Protection Clause, the *discriminatory classification* must itself advance the legitimate aim of the legislature. *Romer*, 517 U.S. at 631; *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 449. Petitioner does not dispute that the State may criminalize sexual activity between older and younger teenagers to discourage sex among teenagers -- a goal that could be based in morality, among other things. But restricting the Romeo and Juliet law to members of the opposite sex advances only one moral view: disapproval of gay teenagers. A law that disadvantages gay teenagers because the State disapproves of them is a quintessentially impermissible "classification of persons undertaken for its own sake." *Romer*, 517 U.S. at 635.

Moreover, laws that single out gay teenagers for more severe punishment than their heterosexual peers who engage in identical consensual sexual activity cannot be justified by a desire to protect children from any stigma society attaches

---

sex actors while permitting the exact same conduct among opposite-sex actors."); *Wasson*, 842 S.W.2d at 499 (explaining "issue is not whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference").

[19] Although Petitioner argued in the Kansas courts that the classification based on sexual orientation should be subjected to strict scrutiny, where, as here, the level of scrutiny is an open question and the government action will not survive even the most lenient rational basis review, the proper course is to resolve the case without deciding whether heightened scrutiny is appropriate. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985).

to being gay. Just as the State cannot discriminate in order to protect a child from stigma or opprobrium based on disability, *see Cleburne,* 473 U.S. at 462-63 (Marshall, J., concurring), or race, *see Palmore*, 466 U.S. at 433, it should not be permitted to do so to protect against stigma based on sexual orientation, *see S.N.E. v. R.L.B.,* 699 P.2d 875, 879 (Alaska 1985) (holding stigma associated with having lesbian mother was impermissible consideration in custody decision).

Where discrimination is "embodied in a criminal statute[,] . . . the power of the State weighs most heavily upon the individual or the group" disadvantaged, requiring particular sensitivity to the policies of the Equal Protection Clause. *McLaughlin,* 379 U.S. at 192. As Justice Stewart wrote in *McLaughlin*:

> I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense . . . . [I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious per se.

379 U.S. at 197 (Stewart, J., concurring); *see also Moreno*, 413 U.S. at 536 & n.8 (criminality of applying for food stamps may not depend on applicant's living arrangements); *Oyama v. California,* 332 U.S. 633, 647-48 (1948) (Black, J., concurring) (criminality of owning land may not depend on alienage); *Sail'er Inn, Inc. v. Kirby,* 485 P.2d 529, 531 n.2, 543 (Cal. 1971) (criminality of tending bar may not depend on sex). Despite the particular care required in equal protection cases involving criminal penalties, both the Kansas Supreme Court and the Texas Court of Criminal Appeals have refused even to consider federal challenges to

discriminatory sodomy laws. *See City of Topeka v. Movsovitz,* No. 77,372 (Kan. Ct. App. Apr. 24, 1998), *rev. denied,* 960 P.2d 267 (Kan. 1998) (table);[20] *Lawrence,* 41 S.W.3d 349, *rev. denied,* Nos. 0873-01 and 0874-01 (Tex. Ct. Crim. App. Apr. 17, 2002), *petition for cert. filed,* 71 U.S.L.W. 3116 (July 16, 2002) (No. 02-102).

The Court should grant *certiorari* to clarify that casting disapproval of gay people in terms of morality does not make it a legitimate basis for discrimination and that making the criminal penalty for an act depend on the actor's sexual orientation violates the Equal Protection Clause. At the very least, this case should be held if the Court grants the petition for *certiorari* in *Lawrence,* 41 S.W.3d 349, *petition for cert. filed,* 71 U.S.L.W. 3116 (July 16, 2002) (No. 02-102).

B. Reliance on the Due Process Decision in *Bowers v. Hardwick* Conflicts with the Court's Equal Protection Jurisprudence and Adds to a Conflict in the Federal Circuit Courts and State Courts of Last Resort on an Important Issue of Federal Law

When presented with federal equal protection challenges to discrimination based on sexual orientation, lower courts have divided over the proper interpretation of the Court's decisions in *Romer* and *Bowers*. In *Bowers,* the Court upheld a Georgia sodomy law that applied to both same- and opposite-sex couples, taking care to note that no equal protection question was raised. *Bowers,* 478 U.S. at 196 n.8. Yet, in holding that due process rights to privacy and intimate association do not protect all consensual, private adult sexual activity, *id.* at 189 (rejecting application of *Griswold v. Connecticut,* 381 U.S. 479 (1965)), the Court made no mention of the fact that the Georgia law applied to

[20] A copy of the unpublished decision in *Movsovitz* has been lodged with the Clerk of the Court.

everyone, holding instead that there is no "fundamental right to engage in *homosexual* sodomy." *Id.* at 191 (emphasis added). Ten years later, in *Romer,* the Court applied equal protection principles to strike down a Colorado constitutional amendment that made it illegal to provide civil rights protections based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships[.]" *Romer,* 517 U.S. at 624.

Despite the Court's clear pronouncements in *Bowers* that no equal protection question was presented, 478 U.S. at 196 n.8, and in *Romer* that "classif[ying] homosexuals not to further a proper legislative end but to make them unequal to everyone else" violates equal protection, 517 U.S. at 635, lower courts disagree about the legitimacy of singling out gay people for legal disadvantage when they engage in conduct for which heterosexuals are punished less severely or not at all. *Compare Stemler v. City of Florence,* 126 F.3d 856, 873 (6th Cir. 1997) ("[i]t is inconceivable that *Bowers* stands for the proposition that the State may discriminate against individuals on the basis of their sexual orientation solely out of animus"); *and Gryczan v. State*, 942 P.2d 112, 127 (Mont. 1997) (Turnage, C.J., concurring) (concluding same-sex-only sodomy law violated federal equal protection principles); *with Shahar v. Bowers,* 114 F.3d 1097, 1110 (11th Cir. 1997) (holding Attorney General could revoke offer of employment based on future staff attorney's same-sex wedding ceremony because "*Romer* is about people's condition; this case is about a person's conduct" and "in deciding *Romer,* the Court did not overrule or disapprove (or even mention) *Bowers* . . . , which was similarly about conduct"); *and Lawrence,* 41 S.W.3d at 355 (upholding same-sex-only sodomy law based on *Bowers* and holding *Romer* applies only in cases involving "the right to seek legislative protection from discriminatory practices"), *petition for cert. filed,* 71 U.S.L.W. 3116 (July 16, 2002) (No. 02-102).

In this case, Kansas has sided with Texas and the Eleventh Circuit. Basing its opinion on broad language in *Bowers* rather than analysis under the Court's equal protection jurisprudence, the Kansas Court of Appeals held: "[t]he impact of *Bowers* on [this] case is obvious . . . there is no denial of equal protection when [homosexual] behavior is criminalized or treated differently[.]" App. 12a. The Court of Appeals rejected Petitioner's argument that *Romer* precludes application of *Bowers* in the equal protection context, concluding instead that the equal protection principles delineated in *Romer* apply only when sexual orientation classifications infringe "the right to engage in the political process." App. 12a.

The lower court decisions reflect serious confusion about how the due process decision in *Bowers* and the equal protection decision in *Romer* apply in equal protection cases involving classifications based on sexual orientation. As long as these conflicting interpretations of *Bowers* and *Romer* are allowed to stand, courts will continue to misread *Bowers* as controlling authority in equal protection cases, and gay citizens will continue to be deprived of the equal protection of the laws.

C. Targeting Same-Sex Consensual Activity for Special Condemnation Has Severe Social and Psychological Consequences for Gay Teenagers

Laws that single out gay teenagers or adults for special condemnation send a clear signal that treating gay people as second-class citizens is not only acceptable, but is State policy. Such discrimination by the State contributes to a social climate in which gay teenagers are isolated in their communities, victimized by their peers, and deprived of a meaningful education. As a result, this case presents a question "the settlement of which is of importance to the

public" rather than just to "the parties." *Rice v. Sioux City Mem'l Park Cemetery,* 349 U.S. 70, 79 (1955) (citation omitted).

The stigmatizing effects of Kansas's Romeo and Juliet law are potent. When the State singles out one group of children and punishes them because of who they are, it intensifies feelings of inferiority generated by private discrimination and compounds the psychological and social damage that result from harassment and violence based on sexual orientation. Gay students are particularly vulnerable to the effects of such discrimination because they must often cope with both rejection at home and hate-based harassment at school.[21]

The social and psychological consequences of state-sponsored discrimination are more severe for children and teenagers than for adults. *See, e.g., Brown v. Bd. of Educ. of Topeka,* 347 U.S. 483, 493-94 (1954) (holding effects of discrimination in education "apply with added force to children in grade and high schools"); *Plyler v. Doe,* 457 U.S. 202, 238-39 (1982) (Powell, J., concurring). As the Court explained in *Lee v. Weisman,* 505 U.S. 577, 593-94 (1992), "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."

---

[21] Recent cases and social science literature reflect the sort of pervasive harassment and violence many gay teenagers suffer in school. *See, e.g., Nabozny v. Podlesny,* 92 F.3d 446 (7th 1996); Human Rights Watch, *Hatred in the Hallways: Violence and Discrimination against Lesbian, Gay, Bisexual and Transgender Students in U.S. Schools* 3, 22-24, 37 (2001) at http://www.hrw.org/reports/2001/uslgbt/toc.htm (collecting sources and finding that many gay teenagers skip school, switch schools, miss a semester of classes, or drop out of school completely in order to escape pervasive harassment and violence).

Allowing States to single out gay teenagers for special criminal penalties because of their sexual orientation adds the power of the State to private voices of condemnation. The State should not be in the business of promoting or legitimizing private prejudice. *See Cleburne,* 473 U.S. at 448 ("[T]he electorate as a whole . . . could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'") (quoting *Palmore v. Sidoti,* 466 U.S. 429, 433 (1984)). This case presents an important issue for resolution by the Court not only because of the serious nature of the constitutional questions presented but because of the harm to all gay teenagers that results when the State uses its criminal laws to sanction discrimination based on sexual orientation.

II. The Ruling that Kansas May Punish Petitioner for His Sexual Orientation Conflicts with the Court's Eighth Amendment Jurisprudence

Petitioner was sentenced to an additional 16 years in prison and mandatory registration as a sex offender because of his status as a gay teenager. Any criminal penalty imposed because of a person's status violates the Eighth Amendment prohibition on cruel and unusual punishments. As the Court recently reiterated,

> even though imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual, it may not be imposed as a penalty for the "status" of narcotic addiction because such a sanction would be excessive . . . . Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

Atkins v. Virginia, __ U.S. __, 122 S. Ct. 2242, 2247 (2002) (quoting *Robinson v. California*, 370 U.S. 660, 666-67 (1962)) (internal marks omitted). Likewise, any penalty imposed for the "crime" of being gay violates the Eighth Amendment.[22] The prohibition against status-based punishment is absolute, and the Court should grant *certiorari* to clarify that any criminal penalty based on a person's sexual orientation violates the Eighth Amendment.

Moreover, wholly apart from the illegality of the additional penalty based on his status, Petitioner's sentence violates the general rule that "'punishment for crime should be graduated and proportioned to the offense.'" *Atkins*, 122 S. Ct. at 2246 (*quoting Weems v. United States*, 217 U.S. 349, 367 (1910)); *see also Solem v. Helm*, 463 U.S. 277, 290 (1983); *Harmelin v. Michigan*, 501 U.S. 957, 997-98 (1991) (Kennedy, J., concurring in part and concurring in judgment); *id.* at 1009-11 (White, J., dissenting).

A "threshold comparison" of Petitioner's offense – having consensual oral sex with another teenager who is close in age – and the penalty imposed – a sentence of over 17 years in prison, 5 years of probation, and a lifetime as a registered sex offender – creates an inference of gross disproportionality. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).[23] Indeed, Kansas itself acknowledged the disproportionality of such a penalty when it enacted the

---

[22] Petitioner does not contend that punishing an older teenager for engaging in consensual oral sex with a younger teenager is cruel and unusual; rather, it is the *additional* punishment imposed because of Petitioner's status that violates the Eighth Amendment.

[23] The Court has granted *certiorari* in another case involving the scope of the Court's test for gross disproportionality in cases involving sentences other than death. *See Andrade v. Attorney Gen. of California*, 270 F.3d 743 (9th Cir. 2001), *cert. granted sub nom. Lockyer v. Andrade*, 70 U.S.L.W. 3497 (Apr. 1, 2002) (No. 01-1127).

Romeo and Juliet law "to recognize the judgment that consensual sexual activity between a young adult and a not-quite adult, although wrong, is not as criminal as sexual activity between persons farther apart in age." App. 7a.

Sentences imposed on other criminals in Kansas highlight the disparity. A heterosexual teenager who performed consensual oral sex on another teenager would have received a maximum sentence of 15 months, even with the same juvenile adjudication history. Yet Petitioner was sentenced to 206 months, a sentence equivalent to what someone with the same juvenile history would have received for intentionally killing another person, inflicting severe bodily harm in the course of a robbery, or using a deadly weapon to terrorize a kidnapping victim. *See* Kan. Stat. Ann. § 21-3403 (voluntary manslaughter); § 21-3427 (aggravated robbery); § 21-3420 (kidnapping).

In fact, despite the established rule that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence," *Solem*, 463 U.S. at 292-93, Petitioner received a much *longer* sentence than someone with his juvenile history would receive for forcible sexual battery of an unconsenting 16 year old, threatening another person with a deadly weapon, or intentionally causing great bodily harm with a deadly weapon. *See* Kan. Stat. Ann. § 21-3518 (aggravated sexual battery: 112-128 months), § 21-3410 (aggravated assault: 31-37 months); § 21-3414 (aggravated battery: 31-37 months).

Rather than applying the Court's relevant Eighth Amendment jurisprudence, the Kansas court rejected Petitioner's challenge without comment. App. 14a. The Court should grant *certiorari* to clarify that the punishment in this case violates the Eighth Amendment because it is grossly disproportionate to the crime.

III. The Ruling Upholding a Sentence Beyond the Statutory Maximum Based on a Prior Juvenile Adjudication Never Alleged in the Complaint, Admitted or Proved to a Jury Adds to a Split of Authority in the Lower Courts on an Important Question of Constitutional Law

The Kansas courts upheld a judicial increase in Petitioner's sentence from a maximum of 61 months to a minimum of 206 months based on a prior juvenile adjudication that was never pled in the Complaint, stipulated to, or proved to a jury. Although the Court has not addressed the precise question presented here, the Court of Appeals decision conflicts with the principles announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In addition, lower courts have divided over whether the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require a State to allege in the charging document that the defendant had previously committed a crime as a juvenile and to prove that fact to a jury beyond a reasonable doubt before using it to increase the sentence beyond the statutory maximum that would otherwise apply.[24]

The Court held in *Apprendi* that "[t]he indictment must contain an allegation of every fact which is legally essential

---

[24] Petitioner waived his right to a jury trial with respect to the facts to which he stipulated, app. 28a, but he was never given the opportunity either to exercise or to waive his right to a jury trial on the fact of his juvenile adjudication history. Indeed, he had no notice that fact was at issue because the State did not allege it in the Complaint, app. 39a, and the trial judge did not address it during the waiver colloquy, app. 28a. Like Apprendi, who pled guilty to the elements of the crime but challenged judicial fact finding at sentencing that resulted in a penalty beyond the statutory maximum, Petitioner was given a longer sentence based on facts that were neither pled nor proved beyond a reasonable doubt at trial. Instead, the sentence-increasing facts were decided by the judge at sentencing under a lower standard of proof.

to the punishment to be inflicted." *Apprendi,* 530 U.S. at 489 n.15. In addition, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490; *see also Ring v. Arizona,* __ U.S.__, 122 S. Ct. 2428, 2439 (2002) ("If a State makes an increase in a defendant's punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."); *Harris v. United States,* __ U.S.__, 122 S. Ct. 2406, 2410 (2002).[25] Shortly after the decision in *Apprendi*, the Ninth Circuit concluded that

> the "prior conviction" exception to *Apprendi's* general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi's* "prior conviction" exception.

United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001).

The Ninth Circuit's decision in *Tighe* follows from the Court's decisions in *Apprendi,* 530 U.S. at 496 ("there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which *the defendant had the right to a jury trial* . . . and allowing the

---

[25] Noting that an exception for pleading and proving prior convictions had been established two years earlier in *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), and that the facts of Apprendi's case did not require the Court to revisit that decision, the Court nevertheless called into question the exception for prior convictions, stating that it "represents at best an exceptional departure from the historic practice that we have described." *Apprendi,* 530 U.S. at 487.

judge to find the required fact under a lesser standard of proof") (emphasis added), and *Jones v. United States,* 526 U.S. 227, 249 (1999) ("One basis for that possible constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

Nevertheless, the Kansas Supreme Court and the Eighth Circuit have rejected the Ninth Circuit's reasoning in *Tighe,* creating a split of authority in the lower courts. *See State v. Hitt,* 42 P.3d 732, 740 (Kan. 2002) (holding "prior juvenile adjudications need not be charged in an indictment or proven to a jury beyond a reasonable doubt before they can be used in calculating a defendant's criminal history score"), *petition for cert. filed* (June 13, 2002) (No. 01-10864); *United States v. Smalley,* 294 F.3d 1030, 1033 (8th Cir. 2002) ("While we recognize that a jury does not have a role in trials for juvenile offenses, we do not think that this fact undermines the reliability of such adjudications in any significant way[.]"). This case presents an opportunity to resolve this important question of constitutional law.

CONCLUSION

For the reasons stated above, the petition for *certiorari* should be granted. Alternatively, the petition should be held pending resolution of the questions presented here in three other cases in which petitions for *certiorari* have been granted or are now pending before the Court. *See Lawrence v. Texas,* 41 S.W.3d 349 (Tex. App.-Houston [14th Dist.] Mar. 15, 2001), *rev. denied,* Nos. 0873-01 and 0874-01 (Tex. Ct. Crim. App. Apr. 17, 2002), *petition for cert. filed,* 71 U.S.L.W. 3116 (U.S. July 16, 2002) (No. 02-102) (Question One); *Andrade v. Attorney Gen. of California,* 270 F.3d 743

(9th Cir. 2001), *cert. granted sub nom. Lockyer v. Andrade,* 70 U.S.L.W. 3497 (Apr. 1, 2002) (No. 01-1127) (Question Two); *State v. Hitt,* 42 P.3d 732, 740 (Kan. 2002), *petition for cert. filed* (June 13, 2002) (No. 01-10864) (Question Three).

Respectfully submitted,

Tamara Lange
(*Counsel of Record*)
Steven R. Shapiro
Matthew A. Coles
James D. Esseks
American Civil Liberties Union
Foundation, Inc.
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioner

Dated: October 10, 2002

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF KANSAS

KANSAS APPELLATE DEFENDER
JAYHAWK TOWERS SUITE 900
700 JACKSON
TOPEKA KS 66603-3740

CASE NO. 00-85898-A

STATE OF KANSAS, APPELLEE,
V
MATTHEW R. LIMON, APPELLANT.

YOUR ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY MATTHEW LIMON.

CONSIDERED BY THE COURT AND DENIED. RESPONSE NOTED.

DATE: 06/13/2002

CAROL G. GREEN
CLERK

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

KANSAS APPELLATE DEFENDER
JAYHAWK TOWERS SUITE 900
700 JACKSON
TOPEKA, KS 66603-3740

CASE NO. 00-85898-A

STATE OF KANSAS, APPELLEE,
V
MATTHEW R. LIMON, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION BY APPELLANT, MATTHEW LIMON.

CONSIDERED BY THE COURT AND DENIED.

DATED: 02/26/2002

CAROL G. GREEN
CLERK

NOT DESIGNATED FOR PUBLICATION

No. 85,898

IN THE COURT OF APPEALS OF THE STATE OF

KANSAS

STATE OF KANSAS,
Appellee,

v.

MATTHEW R. LIMON,
Appellant.

MEMORANDUM OPINION

Appeal from Miami District Court; RICHARD M. SMITH, judge. Opinion filed February 1, 2002. Affirmed.

Paige A. Nichols and *Daniel C. Estes,* assistant appellate defenders, *Randall L. Hodgkinson,* deputy appellate defender, and *Jessica R. Kunen,* chief appellate defender, for the appellee.

Amy L. Harth, assistant court attorney, *David L. Miller,* county attorney, and *Carla J. Stovall,* attorney general, for the appellant.

Julie M. Carpenter and *Nicole G. Berner,* of Jenner & Block, L.L.C., of Washington, D.C., amicus curiae for the DKT Liberty Project.

Tamara Lange and *James D. Esseks,* of American Civil Liberties Union, of New York, New York, and *Kevin Loeffler,* of ACLU of Kansas and Western Missouri, of Kansas City,

Missouri, amici curiae for Lesbian and Gay Rights Project.

Before KNUDSON, P.J., PIERRON and GREEN, JJ.

Per Curiam: Matthew R. Limon was convicted of criminal sodomy, a severity level 3 person felony in violation of K.S.A. 21-3505(a)(2). He was sentenced to 206 months, the lowest presumptive prison sentence on the sentencing grid for that level, with a 60-month period of postrelease supervision based upon a finding that the crime was sexually motivated.

Limon has been diagnosed in the intellectual range between "borderline intellectual functioning" and "mild mental retardation." This means he does not function at the level of a normal 18 year old. He had been admitted to the Lakemary Center (Lakemary), a Kansas residential school for developmentally disabled children. The center focused on serving students with developmental disabilities and psychiatric disorders or behavioral problems. Limon was a resident of Lakemary from July 1999 to February 2000. Limon had been previously placed in the Parkview Passages Residential Treatment Center in Topeka. He had also been previously treated at St. Francis in Ellsworth.

At the time of the allegations in this case, Limon had just had his eighteenth birthday. Limon met another male student at Lakemary, M.A.R., who consented to Limon performing oral sex upon him. When M.A.R. requested that Limon stop, he stopped. It is not clear from the record how the police became involved in this case. Upon their interview of Limon at the school, he admitted to having had consensual oral sexual contact with M.A.R.

M.A.R. was evaluated by Earl Robert Kilgore, Jr., of Lakemary, who also evaluated Limon. M.A.R. was found to function in the upper limits of the range of mild mental

retardation, which represented a slightly lower functioning than Limon. M.A.R. was 14 years and 11 months old at the time of the incident. Limon was 3 years, 1 month, and a few days older than M.A.R.

K.S.A. 21-3505(a) reads: "Criminal sodomy is . . . (2) sodomy with a child who is 14 or more years of age but less than 16 years of age."

K.S.A. 2000 Supp. 21-3522 reads:

"(a) Unlawful voluntary sexual relations is engaging in voluntary: (1) sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and child and the offender are the only parties involved *and are members of the opposite sex*. (Emphasis added.)

(b)(1) Unlawful voluntary sexual relations as provided in subsection (a)(1) is a severity level 8, person felony.

(2) Unlawful voluntary sexual relations as provided in subsection (a)(2) is a severity level 9, person felony.

(3) Unlawful voluntary sexual relations as provided in subsection (a)(3) is a severity level 10, person felony."

Prior to trial, defense counsel filed a "Motion to Dismiss and Prevent Manifest Injustice." In the motion, he argued that due to alleged inequitable and unconstitutional discrimination against a certain group of people (homosexuals) codified into K.S.A. 2000 Supp. 21-3522, Limon was charged under a far more severe statute than the one which, had it been constitutionally drawn by the legislature, would have applied in Limon's case. Defense counsel argued that excluding Limon

from the lesser penalties of prosecution under 21-3522 because of sexual orientation denied him the equal protection of the law under our federal and state Constitutions. He asserted that strict scrutiny must be given to the statute's exclusion of persons on the basis of sexual orientation.

After a hearing, the district court denied Limon's motion and set the case for trial. Limon waived his right to a jury trial and proceeded to a bench trial upon stipulated facts that admitted the substance of the charge on criminal sodomy. Accordingly, the court found Limon guilty. As a result of Limon's previous juvenile adjudications for criminal sodomy 2 years earlier, he was sentenced to 206 months' imprisonment. If the provisions of K.S.A. 2000 Supp. 21-3522 would have been applicable, Limon's sentence would have been in the range of 13 to 15 months.

By means of a supplementary argument which we have allowed Limon to submit, he also argues that the district court's reliance on his prior adjudications to increase his sentence violated the constitutional rights recognized in *Apprendi v. New Jersey,* 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and *State v. Gould,* 271 Kan. ___ , 23 P.3d 801 (2001).

In addition to Limon's brief, we have also received amici curiae briefs from the DKT Liberty Project and the ACLU of Kansas and Western Missouri with the American Civil Liberties Union.

K.S.A. 2000 Supp. 21-3522 is popularly known in Kansas as the "Romeo and Juliet Law." This refers to Shakespeare's literary masterpiece whose central story concerns the love between a noble 13-year-old Veronese maiden, and a young adult Veronese nobleman just a few years older than she.

The purpose of the statute is to recognize the judgment that consensual sexual activity between a young adult and a not-quite adult, although wrong, is not as criminal as sexual activity between persons farther apart in age.

The legislature has restricted the scope of this mitigating provision to heterosexual activity and excluded homosexual activity. Literally, the statute criminalizes particular acts as opposed to sexual orientation. But practically, the argument that it is not aimed at homosexuals cannot be made with a straight face.

The main argument advanced on Limon's behalf is that this statutory scheme violates the Equal Protection Clauses of the United States and Kansas Constitutions. It allegedly does so by discriminating on the basis of gender. As noted above, had either Limon been a female engaging in consensual sexual activity with an adolescent boy in the group home, or had Limon's victim been female, the sentence would have been in the range of 13 to 15 months in prison. Instead, because he is a male engaging in the forbidden conduct with another male, he was sentenced to over 17 years in prison with 5 years of postrelease supervision.

The basic question presented to us is whether the United States and Kansas Constitutions allow the Kansas Legislature to so discriminate between homosexual and heterosexual activity.

The constitutionality of a statute is a question of law that is subject to de novo review. *Peden v. Kansas Dept. of Revenue,* 261 Kan. 239, Syl. ¶ 1, 930 P.2d 1 (1996), *cert. denied* 520 U.S. 1229 (1997). Whether a statute violates equal protection is a question of law over which this court has unlimited review. See *Barrett v. U.S.D. No. 259*, 272 Kan. __, Syl. ¶ 2, 32 P.3d 1156 (2001). The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity,

and before the statute may be stricken down, it must clearly appear the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt. *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City,* 264 Kan. 293, 300, 955 P.2d 1136 (1998).

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Sections 1 and 2 of the Bill of Rights of the Kansas Constitution provide the state's counterpart to the federal Equal Protection Clause:

"§ 1. Equal rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness.

§ 2. Political Power; privileges. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency."

"[T]hese two provisions are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." *Farley v. Engelken,* 241 Kan. 663, 667, 740 P.2d 1058 (1987). Specifically, Section 1 of the Kansas Constitution Bill of Rights applies in cases like ours when an equal protection challenge involves individual rights.

We do note that the Kansas Constitution *can* afford greater rights than the federal Constitution on issues that are addressed by both documents. However, for various reasons, Kansas generally follows the interpretation given to similar provisions in the United States Constitution by the United States Supreme Court. (See, *e.g., State v. Boster,* 217 Kan. 618, 539 P.2d 294, [1975], *overruled by State v. Fortune,* 236 Kan. 248, 689 P.2d 1196 [1984] after the intervening case of *South Dakota v. Opperman,* 428 U.S. 364, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 [1976]; *Cf., State v. Morris,* 255 Kan. 964, Syl. ¶ 3, 880 P.2d 1244 [1994]).

The only possible exceptions appear to be in the very limited and unrelated areas addressed in *Wentling v. Medical Anesthesia Services,* 237 Kan. 503, 701 P.2d 939 (1985), and *Ernest v. Faler*, 237 Kan. 125, 697 P.2d 870 (1985), having to do with access to the courts and other ramifications of certain "tort reform" provisions.

This court follows the decisions of the United States Supreme Court and the Kansas Supreme Court, absent some indication the court would depart from that precedent. *Gadberry v. R.L. Polk & Co.,* 25 Kan. App. 2d 800, 808, 975 P.2d 807 (1998). We have no indication that the United States Supreme Court or the Kansas Supreme Court would adopt the position taken by Limon.

As argued by both parties, the United States Supreme Court applies three levels of scrutiny when examining legislative action which might be said to treat differently classified persons unequally. The class involved here is persons who engage in homosexual behavior.

Classifications involving "suspect" classes or fundamental rights are examined under "strict scrutiny," which shifts the presumption against the statute's usually presumed

constitutionality, and requires the State to demonstrate that the classification is necessary to serve a compelling state interest. *Shapiro v. Thompson,* 394 U.S. 618, 634, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969). Fundamental rights recognized by the Supreme Court include voting, privacy, marriage, and travel. *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Hill v. Stone,* 241 U.S. 289, 44 L. Ed. 2d 172, 95 S Ct. 1637(1975). The suspect classes which the Court has recognized include race, ancestry, and alienage. *Graham v. Richardson,* 403 U.S. 365, 29 L. Ed. 2d 534, 93 S. Ct. 1848 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964); *Oyama v. California*, 332 U.S. 633, 92 L. Ed. 249, 68 S. Ct. 269 (1948).

A less stringent standard is "heightened scrutiny," which applies to "quasi-suspect" classes and requires the classification to substantially further a legitimate legislative purpose. *Farley*, 241 Kan. at 669.

The final and least stringent test of constitutionality is the "rational basis" test. Under this test the State must show the statutory classifcation bears some rational relationship to a valid legislative purpose. *KPERS v. Reimer & Koger Assocs., Inc.*, 261 Kan. 17, 41-42, 927 P.2d 466 (1996).

Limon appears to contend that the Kansas Legislature is without constitutional authority to treat crimes of the nature involved here, (homosexual acts) differently from crimes involving heterosexual acts, as this involves unlawful discrimination. In fact, at oral argument, Limon's counsel acknowledged adoption of this reasoning would probably also call into question the constitutionality of K.S.A. 21-3505(a)(1), which criminalizes adult consensual homosexual behavior in Kansas.

The difficulty with Limon's position is that the United States Supreme Court and the Kansas Supreme Court have given no indication that they are willing to extend "strict scrutiny" analysis and protections to legislation involving homosexual acts.

In *Bowers v. Hardwick,* 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), a practicing homosexual brought an action challenging the constitutionality of Georgia's sodomy statute, which criminalized consensual homosexual sodomy. The Court considered the issue presented to be whether the United States Constitution confers a fundamental right upon homosexuals to engage in sodomy. 478 U.S. at 190.

The *Bowers* Court noted that prior decisions have *not* construed the United States Constitution to confer a right of privacy that extends to homosexual sodomy, contrary to the ruling in the decision of the Court of Appeals for the Eleventh Circuit in the case.

The Court, in analyzing the many cases involving privacy and sexual matters, among them *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), and *Meyer v. Nebraska,* 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) (child rearing and education); *Prince v. Massachusetts,* 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944) (family relationships); *Skinner v. Oklahoma,* 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942) (procreation); *Loving v. Virginia,* 388 U.S. 1 (marriage); *Griswold v. Connecticut,* 381 U.S. 479 and *Eisenstadt v. Baird,* 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972) (contraception); and *Roe v. Wade,* 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973) (abortion), noted that "we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." 478 U.S. at 190-91.

The *Bowers* court further stated: "Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." 478 U.S. at 191.

The impact of *Bowers* on our case is obvious. The United States Supreme Court does not recognize homosexual behavior to be in a protected class requiring strict scrutiny of any statutes restricting it. Therefore, there is no denial of equal protection when that behavior is criminalized or treated differently, at least under an equal protection analysis.

It should be noted that *Bowers* was a 5-4 decision. However, there is no present indication that the decision would be different today.

An argument might be raised that *Romer v. Evans*, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), shows some shift in opinion. The *Romer* Court struck down an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination. While the decision did extend protection to homosexuals from state action, the issue was not one of protecting the right to engage in sodomy, but protecting the right to engage in the political process to seek protection from discrimination.

The Court noted that it is very clear that a law, such as Colorado's, which makes it more difficult for one group of citizens to seek aid from the government, is itself a denial of equal protection of the laws in the most literal sense. This is an entirely different issue than that in *Bowers* or the instant case.

The validity of antisodomy statutes was not questioned in *Romer*, and no indication was given that *Bowers* was no longer good law.

According to the excellent briefs filed on Limon's behalf, 24 states and the District of Columbia have statutorily struck down their sodomy statutes, and the courts of 7 other states have struck down their state sodomy laws, apparently on state constitutional grounds. As of July 2000, 18 states continue to have sodomy laws in force; 5 of those (including Kansas) outlaw only same-sex sodomy.

While these facts should be considered by legislatures in evaluating the fairness or humanity of their criminal laws, they have yet to succeed in the United States Supreme Court or the Kansas Supreme Court on constitutional equal protection grounds. This intermediate Court of Appeals is without proper authority to ignore the rulings of the United States Supreme Court or the federal constitutional provisions concerning equal protection jurisdiction, or the Kansas Supreme Court's likely adherence to them in interpreting our state constitutional provisions in that area.

We must, therefore, affirm the trial court's ruling.

Limon has been allowed to raise an additional argument concerning his sentencing. Limon was sentenced to 206 months of imprisonment, which is the lowest sentence in the grid box for a severity level 3 offense with a criminal history category of B. His history consisted of two prior juvenile adjudications for aggravated criminal sodomy. Without consideration of these offenses the presumptive sentence would have been 55 to 61 months.

Limon contends that the use of the prior juvenile adjudications to increase his sentence violated constitutional rights recognized in *Apprendi* and *Gould*.

In *Apprendi,* the defendant pled guilty to firearms offenses and was sentenced to an extended term under New

Jersey's hate crime statute. On appeal, the United States Supreme Court ruled in part that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond that prescribed in the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490.

In *Gould,* Kansas followed *Apprendi* and struck down as facially unconstitutional those portions of our sentencing system in conflict with *Apprendi.* 23 P.3d at 814.

Limon argues that juvenile adjudications cannot be used far purposes of increasing a sentence. The fact that juvenile adjudications are not actually criminal convictions is argued to prevent them being so used.

Apprendi did not involve a juvenile or the use of prior juvenile adjudications to enhance an adult sentence. Neither issue was addressed there and apparently neither has been discussed in the United States Supreme Court. This specific issue was discussed in *State v. LaMunyon,* 259 Kan. 54, 63-65, 911 P.2d 151 (1996), and decided squarely against the appellant. We are bound by this determination. Juvenile adjudications can be used under present law to enhance adult sentences without implicating constitutional bars.

This decision does not deal with any possible Eighth Amendment issues that might be generated by the much greater sentence since this involves a homosexual as opposed to heterosexual encounter. This issue has not been raised.

Neither does this decision deal with the wisdom of the statute involved, as that is left to the legislature in our governmental system with its separation of powers.

Affirmed.

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

STATE OF KANSAS	Plaintiff
vs.	Case No. 00CR36
MATTHEW R. LIMON,	Defendant

TRANSCRIPT OF CONTINUATION OF SENTENCING AND DEFENDANT'S MOTION FOR DISPOSITIONAL DEPARTURE

PROCEEDINGS had before the Honorable RICHARD M. SMITH, District Judge of the Sixth Judicial District of the State of Kansas, at Paola, Kansas, on the 24th day of August, 2000.

APPEARANCES

The Plaintiff, State of Kansas, appeared by and through MS. AMY L. HARTH, Assistant Miami County Attorney, Miami County Courthouse, 120 South Pearl Street, Room 300, Paola, Kansas 66071.

The defendant, Matthew R. Limon, appeared in person, in custody, and by and through his court-appointed attorney, MR. ANTHONY A. LUPO, Assistant Public Defender for Miami County, 127 South Kansas Avenue, Olathe, Kansas 66061.

***

JUDY JECK
Official Court Transcriber
Sixth Judicial District
State of Kansas

[. . .]

MR. LUPO: Judge, the -- the last -- in Paragraph No. 7 in our motion, we bring up the issue of whether -- that it -- that it would be cruel and unusual to sentence him under the presumption, the statutory presumption that -- The argument here is that it -- the -- the presumptive sentence basically offends the fundament -- fundamental motions of human dignity, that it's disproportionate to the crime with which Mr. Limon was convicted. We've seen, as I argued before about the other statute, how other people can be treated so much differently for basically the same kind of conduct; and we would argue that it would be cruel and unusual to -- to sentence him above and beyond what a similar person would be -- would be sentenced to and a -- in a situation involving members of the opposite sex.

Your Honor, for those reasons, we would ask that the -- that you would grant our departure motion, that you would either grant Mr. Limon probation to the residential center, in a place where he's not goin' to be housed with minors and run into that problem that he did in Lakemary, or that you would grant him a -- a departure down to a term of 14 months.

[. . .]

THE COURT: Do the parties have any legal cause to show why judgment and sentence might not now be pronounced upon the Defendant?

MS. HARTH: None by the State, Judge.

MR. LUPO: No, Your Honor.

THE COURT: I'm going to make the specific factual finding that there is not good and sufficient reason on the record for this Court to grant a departure. Therefore, the Court will follow the legislatively prescribed sentence in this matter.

Matthew R. Limon, having been found guilty of one count of Criminal Sodomy, in violation of KSA 21-3505(a)(2), a severity level 3 person felony, by virtue of your criminal history score being Category B, it will be the judgment and sentence of this Court that you are hereby sentenced to the custody of the Department of Corrections for a period of 206 months. I'm going to order that the post-release supervision period, because this was a sexually motivated crime, be set at 60 months and order the Defendant remanded to the custody of the Department of Corrections in order to serve his sentence.

MR. LUPO: Your Honor, we would ask for the 182 days jail time credit.

THE COURT: Credit for time -- all time served on this offense will be granted.

Court will be at recess.

(Whereupon, the hearing was adjourned.)

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

STATE OF KANSAS,
Plaintiff,

v. Case No.: 00CR36

MATTHEW R. LIMON,
Defendant.

JOURNAL ENTRY

NOW ON this 10th day of August, 2000, this matter comes on before the Honorable Richard M. Smith, Judge of the District Court for hearing on defendant's Motion for Durational and Dispositional Departure. The State appears by Amy L. Harth, Assistant County Attorney. The defendant appears in custody and by his attorney, Anthony A. Lupo, Assistant District Defender.

Thereupon, the Court, after hearing arguments of counsel, continues this matter until the 24th day of August, 2000 at 1:00 p.m.

NOW ON this 24th day of August, 2000, this matter comes on for further hearing. All parties appear as before. Thereupon, the Court, being well and duly advised in the premises, denies defendant's motion for departure.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that defendant's Motion for Departure is hereby denied.

IT IS SO ORDERED.

s/Richard M. Smith
Honorable Richard M. Smith
Miami County District Court Judge

IN THE DISTRICT COURT OF MIAMI COUNTY,
KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff	)	
vs.	)	Case No. 00 CR 36
MATTHEW R. LIMON, Defendant.	)	

NOTICE AND MOTION
FOR DISPOSITIONAL DEPARTURE

COMES NOW the Defendant, Matthew R. Limon, by and through his attorney, Anthony A. Lupo, Assistant Public Defender for Miami County, Kansas, and informs the District Attorney and the Court of his intent to seek a durational departure from the presumptive sentence to a prison term no longer than 14 months, and or a dispositional departure to probation in the above-captioned case.

In support of this motion, Mr. Limon states:

[. . .]

7. An imposition of the presumptive sentence would violate Mr. Limon's rights under the Eighth Amendment, derived through the Fourteenth Amendment, and his right under Section Nine of the Kansas Constitution to be free from cruel and unusual punishment. First, no violence was involved. This is not a case of forcible sodomy. Secondly, there is no indication of injury suffered by the victim. Thirdly, the penological purposes of the prescribed punishment are obscured by the legislature lowering the severity level for the exact kind of

conduct performed by members of the opposite sex under the Unlawful Voluntary Sexual Relations statute (which would presume a fourteen month sentence for a criminal history B category). Further, rehabilitation and supervision are readily available in a place where minors do not reside. See State v. Freeman, 223 Kan. 362, 574 P.2d 950 (1978) (the facts of the crime, the violent or nonviolent nature of the offense, the extent of the culpability for the injury resulting, and penological purposes of the prescribed punishment should be considered in determining whether the length of sentence offends the constitutional prohibition against cruel punishment). The presumptive sentence in the instant case is truly disproportionate to the crime.

REQUESTED ORDER

WHEREFORE, the Defendant requests the Court's finding that the allegations contained herein are substantial and compelling reasons to deviate from the statutory presumptions and to enter an order granting the durational/dispositional departure to probation.

Dutifully submitted,

s/Anthony A. Lupo
Anthony A. Lupo #18364
Assistant Public Defender
127 S. Kansas
Olathe, KS 66061
(913) 829-8755

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the

foregoing motion was hand delivered to the District Attorney's office on this 13 day of July, 2000.

s/Anthony A. Lupo

NOTICE OF HEARING

Please take notice and be advised that the foregoing motion will be heard at 1:30 p.m. on the 10th day of August, 2000.

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

STATE OF KANSAS — Plaintiff

vs. — Case No. 00CR36

MATTHEW R. LIMON, dob 2-9-82 — Defendant

JOURNAL ENTRY

NOW, on this 27th day of June, 2000, this matter comes before the Honorable RICHARD M. SMITH, District Judge, for trial. Appearing on behalf of the State of Kansas, AMY L. HARTH, Assistant Miami County Attorney. The Defendant appears in person and with ANTHONY A. LUPO, his attorney.

WHEREUPON, the Defendant advises that he will waive his right to a jury trial and wishes to proceed to trial on stipulated facts.

WHEREUPON, the Court inquires as to the Defendants understanding of his right to jury trial. The Court finds that the Defendant has knowingly, freely and voluntarily waived his right to a trial by jury.

WHEREUPON, the Court then proceeds with the trial. Based on the stipulation of facts provided in writing by the parties, the Court finds the Defendant guilty of Criminal Sodomy, in violation of KSA 21-3505(a)(2), being a severity level 3 person felony.

WHEREUPON, the Court orders a presentence investigation and report. The presentence investigation report and evaluation reports shall be filed with the Court by July 28, 2000. The parties have until August 7, 2000 to file motions for

departure or objections to the criminal history. Sentencing shall be held August 10, 2000 at 1:30 p.m.

LET THIS ORDER BE ISSUED.

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

STATE OF KANSAS Plaintiff

vs. Case No. 00CR36

MATTHEW R. LIMON, Defendant

TRANSCRIPT OF TRIAL TO THE COURT

PROCEEDINGS had before the Honorable RICHARD M. SMITH, District Judge of the Sixth Judicial District of the State of Kansas, at Paola, Kansas, on the 27th day of June, 2000.

APPEARANCES

The Plaintiff, State of Kansas, appeared by and through MS. AMY L. HARTH, Assistant Miami County Attorney, Miami County Courthouse, 120 South Pearl Street, Room 300, Paola, Kansas 66071.

The Defendant, Matthew R. Limon, appeared in person, in custody, and by and through his court-appointed attorney, MR. ANTHONY A. LUPO, Assistant Public Defender for Miami County, 127 South Kansas Avenue, Olathe, Kansas, 66061.

***

JUDY JECK
Official Court Transcriber
Sixth Judicial District
State of Kansas

[. . .]

THE COURT: Mr. Limon, do you understand that your case was originally scheduled for purposes of a jury trial

beginning this morning -- this afternoon, actually, at 1:00?

THE DEFENDANT: Yes, sir.

THE COURT: Is it your intention to waive your right to that jury trial?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Limon, do you understand that all defendants charged with a criminal offense and particularly persons charged with felonies have an absolute constitutional right to a trial by jury for a jury to determine whether or not the State can prove beyond a reasonable doubt whether or not a defendant is guilty or not guilty? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lupo, are you satisfied that you have counseled Mr. Limon adequately and he fully and intelligently understands his right to a jury trial and that this waiver is made freely and voluntarily on his part?

MR. LUPO: Yes, I am, Your Honor.

THE COURT: Mr. Limon, has anyone made any threats or promised you anything in exchange for this waiver of you right to a jury trial?

THE DEFENDANT: No, sir.

THE COURT: Very well. Mr. Limon, do you further understand that after I accept your waiver that this matter is to go ahead and proceed to a trial to the Court? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that that trial's goin' to consist of a stipulation that's going to be entered into whereby you and your counsel will stipulate that on or about the 16th day of February, while in Miami County, Kansas, that you willfully, feloniously and knowingly had oral contact with the genitalia of M.A.R., dob 3/17/85, a male, an act constituting criminal sodomy, in violation of KSA 21-3505-(a)(2); that M.A.R. consented to the oral genital contact; and upon request of M.A.R., the Defendant stopped oral contact with the victim. Do you understand that that will be the stipulation of facts that will be presented to this Court for this Court to make a determination of your guilt or non-guilt? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you agreeable with that procedure?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Lupo, again, have you fully and completely advised Mr. Limon of the legal ramifications of prceeding to a trial to the Court based upon the stipulation of facts that the Court's previously read into the record?

MR. LUPO: Your Honor, I discussed with Mr. Limon that doing this he'd be found guilty and we've gone over the sentencing grid and discussed all that, that what would come next would be the sentencing, and I've explained to him departures and the things that go along with the sentencing, as well.

THE COURT: Very well. The Court then will accept the Defendant's waiver of his right to a trial by jury, direct that the matter proceed then to a trial to the Court on the basis of the

stipulation of facts previously read upon the record.

Having accepted that stipulation of facts which has been approved and signed off on by both attorneys, I will then enter -- find the Defendant guilty of one count of Criminal Sodomy, in violation of KSA 21-3505(a)(2), -- I don't have the court file. I've got the wrong files up here. Counsel hang on just a second, -- a severity level 3 person felony.

Having made that determination and entered that judgment adjudicating the Defendant guilty of that offense, I will order a presentence investigation. I'll order that the presentence investigation be filed with the Court on or before August the 1st, order that any objections to criminal history or requests for departure be filed on or before August the 8th. And presuming there are none, I'll order the Defendant back before the Court on August the 10th, at 1:00o'clock for the purposes of sentencing.

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

STATE OF KANSAS — Plaintiff

vs. — Case No. 00 CR 36

MATTHEW R. LIMON, dob 2-9-82 — Defendant

STIPULATION OF FACTS

That the defendant, Matthew R. Limon, dob 2-9-82, a male, on the 16th day of February, 2000, while within Miami County, Kansas, did willfully, feloniously and knowingly have oral contact with the genitalia of M.A.R., dob 3-17-85, a male, an act constituting criminal sodomy, in violation of KSA 21-3505(a)(2). M.A.R. consented to the oral-genital contact; upon request of M.A.R., the defendant stopped oral contact with the victim.

Submitted By:

s/Amy L. Harth
Amy L. Harth, #16739
Assistant Miami County Attorney

s/Anthony A. Lupo
Anthony A. Lupo, #18364
Attorney for the Defendant

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

STATE OF KANSAS	Plaintiff
vs.	Case No. 00CR36
MATTHEW R. LIMON, dob 2-9-82	Defendant

JOURNAL ENTRY

NOW, on this 18th day of May, 2000, this matter comes before the Honorable RICHARD M. SMITH, District Judge. Appearing on behalf of the State of Kansas, AMY L. HARTH, Assistant County Attorney. The Defendant appears in person, in custody and with ANTHONY A. LUPO, his court-appointed attorney.

WHEREUPON, this matter comes before the Court on the Defendant's motion to dismiss. The Court hears arguments of counsel.

IT IS THE ORDER OF THE COURT that the Defendant's motion is denied. At the request of the Defendant, this matter is set for status check on June 1, 2000.

LET THIS ORDER BE ISSUED.

s/Richard M. Smith
RICHARD M. SMITH
District Judge

SUBMITTED BY:

s/Amy L. Harth
AMY L. HARTH, #16739
Assistant County Attorney

APPROVED BY:

s/Anthony A. Lupo
ANTHONY A. LUPO, #18364
Attorney for Defendant

H:\Criminal\xlimon.doc

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

STATE OF KANSAS	PLAINTIFF
vs.	Case No. 00CR36
MATTHEW R. LIMON,	Defendant

TRANSCRIPT OF HEARING UPON DEFENDANT'S MOTION TO DISMISS

PROCEEDINGS had before the Honorable RICHARD M. SMITH, District Judge of the Sixth Judicial District of the State of Kansas, at Paola, Kansas, on the 18th day of May, 2000.

APPEARANCES

The Plaintiff, State of Kansas, appeared by and through MS. AMY L. HARTH, Assistant Miami County Attorney, Miami County Courthouse, 120 South Pearl Street, Room 300, Paola, Kansas 66071.

The Defendant, Matthew R. Limon, appeared in person, in custody, and by and through his court-appointed attorney, MR. ANTHONY A. LUPO, Assistant Public Defender for Miami County, 127 South Kansas Avenue, Olathe, Kansas 66061.

***

JUDY JECK
Official Court Transcriber
Sixth Judicial District
State of Kansas

PROCEEDINGS

(Hearing commenced on the 18th day of May, 2000, at the Miami County Courthouse, Paola, Kansas.)
[. . .]

THE COURT: Counsel, would you give me about -- I'm goin' to estimate this. Give me about five minutes. I'm goin' to stay right here, cause I have my computer right here, not back in my office. I'm just goin' to recess without getting up and leaving. You all can stay here if you'd like.

(Whereupon, a recess was taken, after which the following proceedings were held in open court:)

THE COURT: The issue as framed and argued in this case is basically one of any quality of punishment and whether or not that rises to a level that, in fact, would make the operation of the two statutes concerned, which are KSA 21-3522 and KSA 21-3505(a)(2), unconstitutional as it relates to a person who, in fact, has engaged in homosexual relations with a child, and would fit otherwise the statutory definitions that would make the more specific crime applicable, that being 21-3522, unlawful sexual relations.

Initially, under ***U.S. v. Griswald***, the right to privacy that has been recognized under that statute has, in fact, not been extended to that degree to homosexual conduct. There is no determination in the context of a criminal sanction that people who may be homosexual are members of a suspect classification. The Supreme Court has not gone so far as to rule that.

But in any event, the issue then before the Court, as framed by the Defendant in this case, I don't view as a ***Griswald*** right to privacy issue, as one more of an unconstitutional authorization of criminal sanctions which would rise to the level

that it infringes upon the State's -- the State has exceeded its legitimate and proper exercise of police power, in other words, by virtue of the unequal -- inequal -- the -- theoretically, the unequal treatment of similarly situated individuals who can only be distinguished by whether or not they engaged in homosexual as opposed to heterosexual activity. That is the issue, as I perceive it to have been framed.

Turning to, then, the test that is to be employed, I would refer to ***State v. Baker***, at 11 Kan. App. 2d 4. In Syllabus Paragraph No. 2, the Court of Appeals stated, "The yardstick for measuring equal protection arguments is the 'reasonable basis' test set forth in ***McGowan v. Maryland***."

In discussing that standard, the Court went on to quote, "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Going on to Syllabus Paragraph 3, "The reasonable basis test employs a relatively relaxed standard reflecting the court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task."

In the case of ***State v. Weathers*** (phonetic), having to do with the unequal application by law of a statute having to do with crimes relating to hand -- or to weapons, the Supreme Court stated, "The legislature acting in pursuance of the police power of the State is empowered to adopt measures in furtherance of the public welfare, and its enactments in that area are not to be judicially curtailed where they reasonably relate to the legitimate ends sought to be accomplished. Classifications honestly

designed to protect the public interests against evils which might otherwise occur are to be upheld unless they are unreasonable, arbitrary or oppressive. In the ***Tri-State*** case, this Court reiterated the time-honored rule to due process permits the exercise of a wide scope of discretion by the legislature in establishing classifications in the exercise of its police powers, and the law vitiates what is done in such connection only where there is no rational basis for its support."

Applying those two rules, it is apparent that the legislature, in its wisdom, has determined and made a specific delineation between homosexual and heterosexual contact between people who might be minors and/or, at least under the age of 19, and children in a certain age category, and this legislature chose in adopting that statute to make that applicable only to heterosexual activity.

Going back to the ***Weathers*** case in that, this Court, in trying to make a determination as to whether or not that represents a valid exercise of police power, has to rely on the concept that there -- if there is any conceivable legitimate purpose that might be satisfied by that delineation, then this Court shall not interject its opinion and overrule the legislature. It is apparent that the legislature has made a determination, for whatever reason, that consensual heterosexual activity between a select group of people justifies a lower criminal classification or severity level of a crime than does any other and, arguably, inclusive of homosexual activity.

The State is empowered with the rights to protect children and if it was the state legislature's intention to protect children from homosexual activity at a level greater than heterosexual activity, then it is not for this Court to interject its opinion and pass judgment upon whether or not that State interest was or was not legitimate. If there was any, any conceivable interest, and the protecting of children from certain

activities fits that description, then the legislature has the right to define a separate classification.

I would point out that this is not a circumstance where in ***Williams v. Illinois***, we are making a -- a - we are -- What we're doing is we're looking at a statute that prescribes a certain -- prescribes criminal sanctions for a certain behavior between adults. This is different, not only because of the fact that it's children, but because of the fact that the legislature specifically made a more specific crime to another group. They did not, in my opinion, -- they -- the -- the -- It's also distinguished from the -- the -- it -- on the basis that it is not the same theoretical concept as making the behavior illegal, particularly as between adults, but in between adults and children, as taking a specific group of adults and children or children and children and saying that that is a more specific crime and, for whatever reason, there's a -- there's a legitimate State interest in making those persons who engage in that activity subject to a less severe crime than all of the rest of the persons that do not fit that category but still fit definitions of other crimes, such as 21-3505(a)(2).

That may be a subtle delineation, but I do not think it is a delineation without a distinction because it is. And when you take that in conjunction with the judicial principles of determining whether or not a legitimate interest is -- State interest is pursued and whether or not this statute pursues that interest, then the statute clearly is not unconstitutional.

For those reasons, the Court is going to find that the classification of those persons that fall under 21-3522 and the fact that it excludes homosexual behavior does not represent an invalid, illegitimate or improper exercise of the legis -- of the police power of the Kansas Legislature. As such, I'm going to rule that it is constitutional and, in fact, the motion to dismiss should be denied.

Is there anything else to come before the Court on this matter today, Counsel?

MS. HARTH: Not unless Mr. Lupo's ready for a jury trial date.

MR. LUPO: Your Honor, if we could, I'd like to set this over for another -- for a week, another no-go basis?

THE COURT: Could we set it in a two-week -- on that two-week date that I have for- you?

MR. LUPO: That would --

THE COURT: I'm not here on --

MR. LUPO: That'd be fine.

THE COURT: The reason I'm sayin' that, Mr. -- I don't have -- I'm not here next week, but I'm here in two weeks and I'll be happy to set it then, June the 1st, and set it June the 1st, at 1:30.

MR. LUPO: That's fine.

THE COURT: Thank you very much. Court'll be at recess.

(Whereupon, the hearing was adjourned.)

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS
Courthouse, Paola, Kansas 66071

STATE OF KANSAS — Plaintiff

vs. — Case No. 00CR36

MATTHEW R. LIMON, dob 2/9/82 — Defendant
100 Lakemary Drive, Paola, KS
(Currently in the Miami County Jail)
W/M, 6'0", 160#, Black/Brown
PPD Agency Case No. 00-1232

COMPLAINT/INFORMATION

AMY L. HARTH, Assistant Miami County Attorney, a duly appointed, qualified and acting County or District Attorney or assistant of said county and district, and for and on behalf of the said State being first duly sworn on oath gives the Court to understand and be informed:

COUNT ONE
[Criminal Sodomy]

That on or about the 16th day of February, 2000, the above-named defendant, within the above-named county in the State of Kansas, then and there being, did then and there contrary to the statutes of the State of Kansas, unlawfully, willfully and feloniously engage in sodomy with a child who is 14 or more years of age, but less than 16 years of age, to-wit: M.A.R., dob 3/17/85. **All being contrary to KSA 21-3505(A)(2), being a severity level 3 person felony, punishable by 55 to 247 months in the state penitentiary and a possible fine not to exceed $300,000.**

Witnesses: M.A.R. Cindy Spory
C.M.S. Lt. Poore
Earl Kilgore Chad Wilson
Roger Smith

s/Amy L. Harth
Complainant

Warrant issued, appearance for bond requirement per warrant $ 50,000.00.

Subscribed and sworn to before me this 28th day of February, 2000.

s/Stephen D. Hill
Judge/Notary Public

KANSAS STATUTES ANNOTATED

CHAPTER 21. CRIMES AND PUNISHMENTS
PART II. PROHIBITED CONDUCT
ARTICLE 35. SEX OFFENSES

§ 21-3501. Definitions

The following definitions apply in this article unless a different meaning is plainly required:

(1) "Sexual intercourse" means any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse. "Sexual intercourse" does not include penetration of the female sex organ by a finger or object in the course of the performance of:

(a) Generally recognized health practices; or

(b) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524 and amendments thereto.

(2) "Sodomy" means oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal. "Sodomy" does not include penetration of the anal opening by a finger or object n the course of the performance of:

(a) Generally recognized health care practices; or

(b) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto.

(3) "Spouse" means a lawful husband and wife, unless the couple is living apart in separate residences or either spouse has filed an action for annulment, separate maintenance or divorce of for relief under the protection from the abuse act.

(4) "Unlawful sexual act" means any rape, indecent liberties with a child, aggravated indecent liberties with a child, criminal sodomy, aggravated criminal sodomy, lewd and lascivious behavior, sexual battery or aggravated sexual battery, as defined in this code.

§ 21-3505. Criminal sodomy.

(a) Criminal sodomy is:

(1) Sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal;

(2) sodomy with a child who is 14 or more years of age but less than 16 years of age; or

(3) causing a child 14 or more years of age but less than 16 years of age to engage in sodomy with any person or animal.

(b) It shall be a defense to a prosecution of criminal sodomy as provided in subsection (a)(2) that the child was married to the accused at the time of the offense.

(c) Criminal sodomy as provided in subsection (a)(1) is a class B nonperson misdemeanor. Criminal sodomy as provided in subsections (a)(2) and (a)(3) is a severity level 3 person felony.

§ 21-3522. Unlawful voluntary sexual relations.

(a) Unlawful voluntary sexual relations is engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex.

(b)(1) Unlawful voluntary sexual relations as provided in subsection (a)(1) is a severity level 8, person felony.

(2) Unlawful voluntary sexual relations as provided in subsection (a)(2) is a severity level 9, person felony.

(3) Unlawful voluntary sexual relations as provided in subsection (a)(3) is a severity level 10, person felony.

Supreme Court, U.S.
FILED
DEC 19 2002
OFFICE OF THE CLERK

No. 02-583

IN THE

Supreme Court of the United States

MATTHEW R. LIMON,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Kansas Court of Appeals

BRIEF IN OPPOSITION

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(*Counsel of Record*)
120 S.W. 10th Avenue
2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

8 pp

QUESTION PRESENTED

1. Does the Kansas "Romeo and Juliet" statute — which applies to consensual sodomy between a teenager who is 14-16 years of age and an "offender" who is less than 19 years of age — violate the Equal Protection Clause of the Fourteenth Amendment because it is limited to teenagers of the opposite sex?

2. Does it violate the jury trial rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the trial judge to increase an offender's sentence beyond the statutory maximum based on a prior juvenile adjudication?

3. Does the sentence in this case violate the Eighth Amendment's prohibition on cruel and unusual punishment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

CERTIORARI CONSIDERATIONS 1

I. THIS COURT RECENTLY GRANTED REVIEW ON WHAT IS ESSENTIALLY THE SAME ISSUE RAISED IN THE FIRST QUESTION PRESENTED 1

II. THE *APPRENDI* / PRIOR JUVENILE ADJUDICATION ISSUE IS CURRENTLY PENDING BEFORE THE COURT IN A KANSAS CASE IN WHICH THE COURT REQUESTED THE VIEWS OF THE UNITED STATES 2

III. THE EIGHTH AMENDMENT QUESTION HAS NOT BEEN PRESERVED FOR THIS COURT'S CONSIDERATION 3

CONCLUSION 4

TABLE OF AUTHORITIES

Page

Cases

Almandarez-Torres v. United States, 523 U.S. 224 (1998) 2
Apprendi v. New Jersey, 530 U.S. 466 (2000) 2
Lawrence v. Texas, 41 S.W.3d 349 (Tex. App. 2001) 1, 4
State v. Hitt, 42 P.3d 732 (Kan. 2002), *petition for cert. filed*, No. 01-10864 (June 13, 2002) 2, 3, 4
United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002), *petition for cert. filed*, No. 02-6693 (Oct. 3, 2002) 2, 3
United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001) 2
Kan. Stat. Ann. § 21-3522 1
Tex. Pen. Code § 21.06 1

STATEMENT OF THE CASE

Kansas respectfully adopts the succinct statement of the case set forth in the opinion of the Kansas Court of Appeals in this case. *See* Appendix to Petition for a Writ of Certiorari ("Pet. App.") 4a - 6a

CERTIORARI CONSIDERATIONS

I. THIS COURT RECENTLY GRANTED REVIEW ON WHAT IS ESSENTIALLY THE SAME ISSUE RAISED IN THE FIRST QUESTION PRESENTED

The Court recently granted review of equal protection issues in a Texas case involving a criminal sodomy statute that treats heterosexual and homosexual sodomy differently. *See Lawrence v. Texas*, No. 02-102, *cert. granted*, 71 U.S.L.W. 3379 (Dec. 2, 2002).

Though the Kansas statute at issue here is narrower than the Texas statute in *Lawrence*[*]— the Kansas statute, Kan. Stat. Ann. § 21-3522, applies to reduce the punishment for heterosexual sodomy only in limited circumstances dependent on the ages of the two persons involved (the "victim" aged 14-16 and the "offender" under age 19) — it would not make sense to address the merits of the equal protection issue in this case until the Court has decided the Texas case.

Once the Court has decided *Lawrence v. Texas*, it may well be clear how the equal protection issue in this case should be resolved. Or the Court may, at that time, determine whether plenary review of the issue in this case is warranted.

Thus, in light of the Court's grant of *certiorari* in *Lawrence v. Texas*, and with respect for judicial economy, Kansas

---

[*] The Texas statute challenged in *Lawrence*, Tex. Pen. Code § 21.06, makes it a misdemeanor for a person to engage "in deviate sexual intercourse with another individual of the same sex."

respectfully suggests that the Court hold the petition in this case until it decides *Lawrence*.

II. THE *APPRENDI* / PRIOR JUVENILE ADJUDICATION ISSUE IS CURRENTLY PENDING BEFORE THE COURT IN A KANSAS CASE IN WHICH THE COURT REQUESTED THE VIEWS OF THE UNITED STATES

The Court currently has pending a petition for a writ of *certiorari* in another Kansas case, *Hitt v. Kansas*, No. 01-10864, that raises the question whether prior juvenile adjudications are subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The *Apprendi* rule is that facts used to impose a sentence in excess of the statutory maximum must be determined by a jury. Because Petitioner's sentence in this case was so increased on the basis of a prior juvenile adjudication not proven to a jury, Petitioner raises the application of *Apprendi* to prior juvenile adjudications as the second Question Presented in this case.

In *Almandarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that prior adult criminal convictions need not be pleaded and proved to a jury for sentencing purposes. But *Apprendi* may have drawn that holding into question. At a minimum, lower courts have split on the question whether a "prior conviction" exception–assuming it is valid — should apply to prior *juvenile adjudications*. Compare *State v. Hitt*, 42 P.3d 732 (Kan. 2002) (prior juvenile adjudications need not be pleaded nor proven to the jury), *petition for cert. filed*, No. 01-10864 (June 13, 2002), and *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002) (same), *petition for cert. filed*, No. 02-6693 (Oct. 3, 2002), with *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001) (prior juvenile adjudications must be pleaded and proved to a jury).

Thus, Kansas agrees with Petitioner that this issue merits plenary review by this Court, though that may well occur in

either *Hitt v. Kansas*, No. 01-10864, or *Smalley v. United States*, No. 02-6693, both of which are currently pending before the Court. Furthermore, Kansas respectfully reminds the Court that it requested the views of the Solicitor General in *Hitt v. Kansas* on October 21, 2002, and the Solicitor General filed briefs in both *Hitt* and *Smalley* on December 13, 2002.

Given that *Hitt* and *Smalley* are "ahead" of this case, Kansas respectfully requests that if the Court is to grant plenary review of this issue, it do so in the *Hitt* case, which presents only *Apprendi* issues and was decided by the Kansas Supreme Court, rather than the intermediate state court of appeals. If the Court grants review in either *Hitt* or *Smalley*, it should hold this case pending resolution of those cases. If the Court denies review in those cases, this case provides a far less suitable vehicle for review of the *Apprendi* / prior juvenile adjudication issue and should be denied.

III. THE EIGHTH AMENDMENT QUESTION HAS NOT BEEN PRESERVED FOR THIS COURT'S CONSIDERATION

With respect to the Eighth Amendment, the Kansas Court of Appeals in this case stated the following:

> This decision does not deal with any possible Eighth Amendment issues that might be generated by the much greater sentence since this involves a homosexual as opposed to heterosexual encounter. *This issue has not been raised.*

Pet. App. 14a (emphasis added).

Thus, any Eighth Amendment challenge has not been preserved for this Court's consideration. In fact, petitioner's suggestion that the lower court "rejected Petitioner's [Eighth Amendment] challenge without comment," Pet. 24, is misleading and incorrect. The Kansas Court of Appeals did not "reject" any Eighth Amendment challenge "without

comment"; rather, it declined to reach or consider any Eighth Amendment issues because it found that such issues had "not been raised." Pet. App. 14a.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court hold the petition with respect to the equal protection issue in light of the Court's recent grant of *certiorari* in *Lawrence v. Texas*, No. 02-102. Similarly, the Court may wish to hold the petition with respect to the *Apprendi* / prior juvenile adjudication issue if the Court grants review of that issue in another pending case, such as *Hitt v. Kansas*, No. 01-10864. But, in any event, the Eighth Amendment issue has not been preserved for the Court's consideration in this case

Respectfully submitted,

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(*Counsel of Record*)
120 S.W. 10th Avenue
2nd Floor
Topeka, Kansas 66612-1597
(785) 296-2215

December 2002

No. 02-583

Supreme Court, U.S.
FILED
DEC 23 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MATTHEW R. LIMON,

Petitioner,

—v.—

KANSAS,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE COURT OF APPEALS OF THE STATE OF KANSAS

REPLY TO BRIEF IN OPPOSITION

Tamara Lange
(*Counsel of Record*)
Steven R. Shapiro
Matthew A. Coles
James D. Esseks
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, INC.
125 Broad Street
New York, New York 10004
(212) 549-2500

5 pp

TABLE OF AUTHORITIES

Cases

Bowers v. Hardwick,
478 U.S. 186 (1986) 2

Costarelli v. Massachusetts,
421 U.S. 193 (1975) 2

Largent v. Texas,
318 U.S. 418 (1943) 2

Nash v. Florida Indus. Comm'n,
389 U.S. 235 (1967) 2

State v. Clemons,
45 P.3d 384 (Kan. 2002) 1, 2

State v. Lewis,
998 P.2d 1141 (Kan. App.),
rev. denied 269 Kan. 938 (Kan. 2000) 1

State v. Long,
993 P.2d 1237 (Kan. App. 1999) 1

Statutes & Regulations

28 U.S.C. § 1257(a) 2

Kan. Stat. Ann. § 21-4721 1

Petitioner's arguments for granting *certiorari* in this case are detailed in the Petition. Petitioner submits this reply solely to address Respondent's contention that the Eighth Amendment challenge is not properly before the Court.

As Petitioner briefly explained in his Petition, Pet. 7 n.10, the Eighth Amendment challenge was preserved in the Kansas courts. Petitioner argued both in a written motion and at oral argument before the Kansas District Court that imposing the presumptive sentence under the criminal sodomy law would violate the Eighth Amendment. App. 16a. The District Court denied Petitioner's motion without commenting on the Eighth Amendment challenge and sentenced him to seventeen years in prison. App. 16a-17a.

Petitioner was statutorily precluded from raising his Eighth Amendment claim before the Kansas Court of Appeals. Kansas law provides that "[o]n appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review: . . . Any sentence that is within the presumptive sentence for the crime." Kan. Stat. Ann. § 21-4721.

The Kansas Supreme Court and Courts of Appeals have held that § 21-4721 deprives Kansas appellate courts of jurisdiction to consider an Eighth Amendment challenge on direct appeal to any sentence within the presumptive statutory guidelines. *See, e.g.*, *State v. Clemons*, 45 P.3d 384, 395 (Kan. 2002) ("The right to appeal is entirely statutory, and pursuant to K.S.A. 21-4721(c)(1), we have no jurisdiction to hear Clemons' appeal on this [Eighth Amendment] issue."); *State v. Lewis*, 998 P.2d 1141 (Kan. App.), *rev. denied* 269 Kan. 938 (Kan. 2000); *State v. Long*, 993 P.2d 1237 (Kan. App. 1999). As a result, the Kansas District Court was the highest state court authorized to consider Petitioner's Eighth Amendment challenge.

28 U.S.C. § 1257(a) provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ." When a state creates a procedural or jurisdictional prohibition that prevents appeal of a claim within the state court system, the trial court constitutes the highest court for purposes of § 1257. *See Largent v. Texas*, 318 U.S. 418, 422 (1943); *Costarelli v. Massachusetts*, 421 U.S. 193, 198-99 (1975); *see also Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967). Petitioner asserted his Eighth Amendment claim in the Kansas District Court – the highest state court authorized to consider the claim. As a result, Petitioner's Eighth Amendment claim is properly before the Court.[1]

As Justice Powell said in his concurrence in *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986), "[t]he Georgia statute . . . authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct – certainly a sentence of long duration – would create a serious Eighth Amendment issue." The Court should grant *certiorari* on the Eighth

[1] Contrary to Respondent's assertion, and contrary to the erroneous statement of the Court of Appeals, App. 14a, Petitioner did raise his Eighth Amendment claim in the appellate court, albeit in reply. He did so in an abundance of caution because, at that time, only the Kansas Court of Appeals had ruled on the jurisdictional question. The Kansas Supreme Court subsequently confirmed the scope of the jurisdictional bar. *See Clemons*, 45 P.3d at 395.

Amendment question in addition to the other Questions Presented in this case.

Respectfully submitted,

Tamara Lange
(*Counsel of Record*)
Steven R. Shapiro
Matthew A. Coles
James D. Esseks
American Civil Liberties Union
Foundation, Inc.
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioner

Dated: December 23, 2002